No. 02-306-CFX Title: Beneficial National Bank, et al., Petitioners
v.
Marie Anderson, et al.

Docketed: August 28, 2002 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Aug 26 2002	Petition for writ of certiorari filed. (Response due October 29, 2002)
	Sep 26 2002	Waiver of right of respondent H&R Block, Inc. to respond filed.
	Sep 30 2002	Order extending time to file response to petition until October 29, 2002.
	Nov 12 2002	Waiver of right of respondents Marie Anderson, et al. to respond filed.
	Nov 13 2002	DISTRIBUTED for Conference of November 27, 2002
	Nov 22 2002	Response requested.
	Dec 23 2002	Brief of respondents Marie Anderson, et al. in opposition filed. VIDED.
	Jan 7 2003	Reply brief of petitioner Beneficial National Bank and Beneficial Tax Masters, Inc. filed.
	Jan 8 2003	REDISTRIBUTED for Conference of January 24, 2003
	Jan 24 2003	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 7, 2003. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, April 4, 2003. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, April 23, 2003. Rule 29.2 does not apply. SET FOR ARGUMENT April 30, 2003. **********
	Mar 3 2003	Record filed.
	Mar 3 2003	Record filed.
	Mar 5 2003	Joint appendix filed.
	Mar 7 2003	Brief amicus curiae of United States filed.
	Mar 7 2003	Brief amici curiae of American Bankers Association, et al. filed.
	Mar 7 2003	Brief of petitioners Beneficial National Bank, et al. filed.
	Mar 11 2003	CIRCULATED.
	Mar 21 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Apr 3 2003	Brief of respondents Marie Anderson, et al. filed.
	Apr 4 2003	Brief amicus curiae of Consumer Attorneys of California filed.
	Apr 4 2003	Brief amici curiae of Arizona, et al. filed.
	Apr 4 2003	Brief amici curiae of AARP, et al. filed.
	Apr 18 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Apr 18 2003	Reply brief of petitioner Beneficial National Bank, et al.

No. 02-306-CFX

Entry	Date	Proceedings and Orders
		filed.
	Apr 30 2003	ARGUED.

Supreme Court, U.S.
FILED

(1)

No. 02-306 AUG 26 2002

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IN THE

Supreme Court of the United States

BENEFICIAL NATIONAL BANK AND
BENEFICIAL TAX MASTERS, INC.,
Petitioners,

v.

MARIE ANDERSON, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has long held that section 30 of the National Bank Act, 12 U.S.C. §§ 85-86, creates an exclusive federal cause of action and an exclusive federal remedy for usury claims by borrowers against national banks, preempting state law under the doctrine of ordinary preemption. Borrowers filed this case against a national bank in state court, claiming violation of state usury law, and the national bank removed the case to federal district court, where a motion to remand was denied. On interlocutory appeal, the United States Court of Appeals for the Eleventh Circuit ordered the district court to remand the case to state court for lack of subject matter jurisdiction and explicitly disagreed with decisions by the United States Court of Appeals for the Eighth Circuit holding that section 30 completely preempts state usury claims against national banks and thus permits removal of cases asserting state usury laws against them. The question presented is:

> Whether a usury claim against a national bank, even if ostensibly brought under state law, necessarily arises under section 30 of the National Bank Act so as to permit a federal court to exercise removal jurisdiction under the doctrine of complete preemption, a question as to which the United States Courts of Appeals are in conflict?

PARTIES TO THE PROCEEDING BELOW

Plaintiffs-Appellants:

Marie Anderson
Alvester Brafort
Walter Brutley
Patricia Coleman
Talaya Cope
Audrey Darby
Annie Davis
April DeLoach
Diane Franklin
Lillie Franklin
Willie Lewis
Caledonia Jackson
Shirley Jernigan
Evelyn Nelson
Willie Lawrence
Mamie Mitchell
Betty Person
Diane Peterson
Gwen Rogers
Williams Screws
Ernestine Starks
Gerald Stokes
Albert Thomas
Charles Thomas
Kenneth Williams
Earline Young

Defendants-Appellees:

Beneficial National Bank
Beneficial Tax Masters, Inc.
H&R Block, Inc.

RULE 29.6 LIST

Household International, Inc. is the parent of Beneficial National Bank and Beneficial Tax Masters, Inc. and is publicly held.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	ii
RULE 29.6 LIST	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
1. The Court of Appeals Decision Directly Conflicts with Decisions of the United States Court of Appeals for the Eighth Circuit.	6
(a) Direct Conflict	6
(b) Other Conflicting Decisions	8
(c) Consequences of Conflict	10
2. The Court of Appeals Decision Is Erroneous and Is Inconsistent With This Court's Longstanding Position That All Usury Claims Against National Banks Arise Under Federal Law	11
(a) Erroneous Analysis	11
(b) This Court's Interpretation of Section 30	13
(c) This Court's Complete Preemption Cases	15
3. The Issue Is Important to the Uniform and Effective Operation of the National Banking System.	17

TABLE OF CONTENTS—Continued

	Page
4. This Case Presents an Opportunity for the Court to Provide Much-Needed Guidance on the Complete Preemption Doctrine.	18
CONCLUSION	21
APPENDICES	
Appendix A—Opinion of the Court of Appeals for the Eleventh Circuit in *Anderson v. H&R Block, Inc.*	1a
Dissenting Opinion of Circuit Judge Tjoflat	17a
Appendix B—Opinion of the District Court for the Middle District of Alabama in *Anderson v. H&R Block, Inc.*	21a
Appendix C—Order of the Court of Appeals for the Eleventh Circuit filed May 29, 2002 denying Petitions for Rehearing En Banc in *Anderson v. H&R Block, Inc.*	29a
Appendix D—National Bank Act, Section 30, 12 U.S.C. § 85	30a
Appendix E—National Bank Act, Section 30, 12 U.S.C. § 86	32a
Appendix F—Federal Question Jurisdiction, 28 U.S.C. § 1331	33a
Appendix G—Actions Removable Generally, 28 U.S.C. § 1441	34a
Appendix H—Order of the Court of Appeals for the Eleventh Circuit filed June 17, 2002 staying the mandate in *Anderson v. H&R Block, Inc.*	36a
Appendix I—Amicus Curiae Brief of the Office of the Comptroller of the Currency	38a
Appendix J—Unpublished Opinion of the District Court for the Middle District of Louisiana in *Gallagher v. H&R Block Eastern Tax Services, Inc.*.	59a

TABLE OF AUTHORITIES

CASES	Page
Ament v. PNC Bank, 825 F. Supp. 1243 (W.D. Pa. 1992), *rev'd*, *Spellman v. Meridian Bank*, Nos. 94-3203, 94-3204, 94-3215 to 94-3218, 1995 WL 764548 (3d Cir. Jan. 12, 1996), *vacated and set for reh'g en banc*, 1996 U.S. App. LEXIS 2506 (3d Cir. Feb. 16, 1996)	12
Anderson v. H&R Block, Inc., 132 F. Supp. 2d 948 (M.D. Ala. 2000)	1, 3
Anderson v. H&R Block, Inc., 287 F.3d 1038 (11th Cir. Apr. 3, 2002)	*passim*
Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968)	*passim*
BLAB T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc., 182 F.3d 851 (11th Cir. 1999)	19
Barnet v. Muncie Nat'l Bank, 98 U.S. 555 (1878)	7, 13, 14
Battiste v. H&R Block, Inc., 209 F.3d 719 (5th Cir. 2000), *aff'g* No. 97-749-A (M.D. La. Jan. 13, 1998)	8
Beeman v. Mbank Houston, N.A., 691 F. Supp. 1027 (S.D. Tex. 1988)	12
Burke v. Northwest Airlines, Inc., 819 F. Supp. 1352 (E.D. Mich. 1993)	19
Cahnmann v. Sprint Corp., 133 F.3d 484 (7th Cir. 1998)	20
Caterpillar Inc. v. Williams, 482 U.S. 386 (1987)	3
Copeland v. MBNA Am., N.A., 820 F. Supp. 537 (D. Colo. 1993)	10, 12
Davis v. Elmira Savings Bank, 161 U.S. 275 (1896)	17

TABLE OF AUTHORITIES—Continued

	Page
Evans v. Nat'l Bank of Savannah, 251 U.S. 108 (1919)	13, 14
Farmers' and Mechanics' Nat'l Bank v. Dearing, 91 U.S. 29 (1875)	7, 10, 13, 14
First Nat'l Bank v. Nowlin, 509 F.2d 872 (8th Cir. 1975)	7
Fortenberry v. Southtrust Bank of Ala. Nat'l Assoc., No. CV-95-B-1691-J, 1996 U.S. Dist. LEXIS 21685 (N.D. Ala. 1996)	12
Franchise Tax Board v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983)	15, 16
Goehl v. Mellon Bank, 825 F. Supp. 1239 (E.D. Pa. 1993), *rev'd*, *Spellman v. Meridian Bank*, Nos. 94-3203, 94-3204, 94-3215 to 94-3218, 1995 WL 764548 (3d Cir. Jan. 12, 1996), *vacated and set for reh'g en banc*, 1996 U.S. App. LEXIS 2506 (3d Cir. Feb. 16, 1996)	12
Goepel v. Nat'l Postal Mail Handlers Union, 36 F.3d 306 (3d Cir. 1994)	20
Haseltine v. Cent. Nat'l Bank of Springfield, 183 U.S. 132 (1901)	13
Heaton v. Monogram Credit Card Bank of Ga., No. 01-30104, 2002 U.S. App. LEXIS 13599 (5th Cir. July 8, 2002, revised July 22, 2002)	6
Hunter v. Rich's Dep't Stores, 945 F. Supp. 1500 (N.D. Ala. 1995)	12
Jones v. Bankboston, N.A., 115 F. Supp. 2d 1350 (S.D. Ala. 2000)	12
Krispin v. May Dep't Store Co., 218 F.3d 919 (8th Cir. 2000)	6, 8
Little York Gold-Washing & Water Co. v. Keyes, 96 U.S. 199 (1877)	5

TABLE OF AUTHORITIES—Continued

	Page
M. Nahas & Co. v. First Nat'l Bank of Hot Springs, 930 F.2d 608 (8th Cir. 1991)	*passim*
Marcus v. AT&T Corp., 138 F.3d 46 (2d Cir. 1998)	20
Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299 (1978)	*passim*
McCollum v. Hamilton Nat'l Bank, 303 U.S. 245 (1938)	7, 13
Metro. Life Ins. Co. v. Taylor, 481 U.S. 58 (1987)	*passim*
Moss v. Southtrust Mobile Servs., No. CV-95-P-1647-W, 1995 U.S. Dist. LEXIS 21770 (N.D. Ala. 1995)	12
Nelson v. Citibank (S.D.) N.A., 794 F. Supp. 312 (D. Minn. 1992)	12
Schmeling v. NORDAM, 97 F.3d 1336 (10th Cir. 1996)	19, 20
Smiley v. Citibank (S.D.), N.A., 517 U.S. 735 (1996)	13, 14
Spellman v. Meridian Bank, Nos. 94-3203, 94-3204, 94-3215 to 94-3218, 1995 WL 764548 (3d Cir. Jan. 12, 1996), *vacated and set for reh'g en banc*, 1996 U.S. App. LEXIS 2506 (3d Cir. Feb. 16, 1996)	8, 9, 12
Strong v. Telectronics Pacing Sys., Inc., 78 F.3d 256 (6th Cir. 1996)	20
Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995)	11
Tiffany v. Nat'l Bank of Mo., 85 U.S. 409 (1873)	13, 18
Watson v. First Union Nat'l Bank of S.C., 837 F. Supp. 146 (D.S.C. 1993)	9, 12

TABLE OF AUTHORITIES—Continued

FEDERAL STATUTES	Page
Employee Retirement Income Security Act, 29 U.S.C. § 1132(a)	15, 16
Judiciary Act of 1875 §§ 1, 2, 18 Stat. 470 (1875)	4
Labor Management Relations Act, 29 U.S.C. § 185	15, 16, 17
National Bank Act, Section 30, 12 U.S.C. §§ 85-86	*passim*
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	2, 3
28 U.S.C. § 1441	2, 3
28 U.S.C. § 1447(d)	11
OTHER AUTHORITIES	
Alabama Code § 8-8-1	2
Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 Tex. L. Rev. 1781 (June 1998)	19
Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 Wake Forest L. Rev. 927 (1996)	19
Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 Hastings L.J. 273 (1993)	19

IN THE

Supreme Court of the United States

No. 02-___

BENEFICIAL NATIONAL BANK AND
BENEFICIAL TAX MASTERS, INC.,
Petitioners,

v.

MARIE ANDERSON, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Beneficial National Bank and Beneficial Tax Masters, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. 1a) is reported at 287 F.3d 1038. The opinion of the United States District Court for the Middle District of Alabama (App. 21a) is reported at 132 F. Supp. 2d 948.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on April 3, 2002. The court of appeals denied timely petitions for rehearing en banc (constituting also petitions for panel rehearing) in an order entered May 29, 2002 (App. 29a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves section 30 of the National Bank Act, 12 U.S.C. §§ 85 (App. 30a), 86 (App. 32a). It also involves 28 U.S.C. §§ 1331 (App. 33a), 1441 (App. 34a).

STATEMENT OF THE CASE

At all times pertinent hereto, Petitioner Beneficial National Bank ("Beneficial") was a national bank chartered under the National Bank Act ("NBA") and subject to the supervision of the Office of the Comptroller of the Currency, United States Department of the Treasury ("OCC"). Beneficial allegedly made tax refund anticipation loans ("RALs") to the respondents, who were tax-preparation customers of defendant H&R Block, Inc. A RAL is a loan made by a bank in the amount of the borrower's anticipated tax refund less interest and fees, enabling the borrower to receive the money more quickly than a tax refund.

The respondents brought suit in Alabama state court against the petitioners, Beneficial and its affiliate Beneficial Tax Masters, Inc., and also against H&R Block, Inc., a tax preparation service, alleging that Beneficial charged usurious interest on the RALs it made to the respondents. The complaint asserts usury claims based on Alabama Code § 8-8-1 and the common law and does not mention section 30 of the NBA (App. 30a-32a).

The petitioners and H&R Block, Inc. timely removed the case to the United States District Court for the Middle District of Alabama, pursuant to 28 U.S.C. § 1441(a) and (b) (App. 34a). Jurisdiction was invoked under 28 U.S.C. § 1331 (App. 33a) on the grounds that the action necessarily arose under the laws of the United States. The respondents moved to remand the case to state court. The district court denied the motion, holding that the claims alleging that Beneficial had charged usurious interest necessarily arose under section 30 of the NBA and thus created federal question or "arising under" jurisdiction pursuant to 28 U.S.C. § 1331, permitting removal under the doctrine of complete preemption. App. 28a. The district court certified the issue for interlocutory appeal.

On appeal, a divided panel of the United States Court of Appeals for the Eleventh Circuit reversed the district court's decision on the grounds that Congress did not clearly express an intent to permit removal under section 30 of the NBA and, therefore, complete preemption did not apply. App. 16a. The dissenting opinion concluded that the doctrine of complete preemption should apply to allow removal. *Id.* at 17a-20a.

The majority stated that removal based on federal question or "arising under" jurisdiction "generally is governed by the 'well-pleaded complaint' rule, which provides that a case may be removed only if the plaintiff's properly pleaded complaint reveals that the claim is based on federal law." *Id.* at 5a (citation omitted). However, the majority recognized that this Court has adopted an exception to this rule–the complete preemption doctrine, which allows removal when "the pre-emptive force of a [federal] statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Id.* (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987)) (internal quotation marks omitted) (bracket in original).

The majority acknowledged that this Court's case law has established that section 30 of the NBA "governs the amount of interest a national bank may charge . . . and provides the exclusive remedy for usury claims against a national bank." App. 13a (citations omitted).[1] Nevertheless, the court held that more is needed for federal removal jurisdiction under complete preemption.

The majority analyzed Supreme Court and Eleventh Circuit decisions on complete preemption and concluded that "congressional intent is the pivotal issue." *Id.* at 8a-9a. The court emphasized that in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), this Court applied the complete preemption doctrine to permit removal after finding a clear congressional intent to permit removal with respect to the statute in question in that case. App. 8a-9a.

After reviewing the legislative history of the NBA, enacted in 1864 during the Civil War, the majority acknowledged that Congress intended to protect the national banking structure from state control and regulation and to protect the newly created national banks from state legislation. *Id.* at 9a-11a. The majority also acknowledged that the NBA was enacted before the statute establishing original federal "arising under" jurisdiction,[2] the general removal statute,[3] the well-pleaded

[1] Section 30 of the NBA has been codified as 12 U.S.C. §§ 85-86. 12 U.S.C. § 85 creates a federal usury standard by allowing a national bank to charge interest

> at the rate allowed by the laws of the State . . . where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater . . . .

App. 30a. 12 U.S.C. § 86 provides the exclusive remedy for usury violations by a national bank. *See* App. 32a.

[2] Judiciary Act of 1875 §§ 1, 2, 18 Stat. 470 (1875).

[3] *Id.*

complaint rule[4] or the complete preemption doctrine.[5] However, it did not consider the fact that removal jurisdiction had not yet been invented in 1864 to be a sufficient basis to forego a showing of specific congressional intent to allow removal. The majority held that, since it could not find a clear congressional intent to permit removal, removal was improper. App. 13a.

In so ruling, the majority acknowledged that its conclusion directly conflicted with decisions of the United States Court of Appeals for the Eighth Circuit that national banks can remove actions alleging usury claims under state law to federal court under complete preemption. *Id.* at 13a-14a. The majority stated that those decisions found complete preemption "based solely on well-settled law that [section 30] . . . provides the exclusive remedy for usury claims against a national bank." *Id.* at 13a. In the majority's view, an expression of specific congressional intent to permit removal was also required.

The petitioners and H&R Block, Inc. timely filed petitions for rehearing en banc, which were denied on May 29, 2002 (App. 29a). The petitioners then sought, and on June 17, 2002, obtained, a stay of the court of appeals' mandate pending the filing of this petition for a writ of certiorari and this Court's disposition (App. 36a).

REASONS FOR GRANTING THE WRIT

As the court of appeals has acknowledged, its two-to-one decision to deny removal jurisdiction in this case directly conflicts with decisions of the United States Court of Appeals for the Eighth Circuit. Numerous conflicting district court opinions exist in other circuits as well, and the conflict can be

[4] *Little York Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199 (1877).

[5] *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968).

resolved only by this Court. The ability of national banks to remove usury cases to the federal courts is important to the uniform administration and enforcement of the NBA, as urged by the OCC, the federal government agency charged with interpreting the NBA, in an *amicus curiae* brief in the court below (App. 38a). The court of appeals decision also is inconsistent with more than one hundred and twenty-five years of decisions by this Court recognizing that all usury claims against national banks are necessarily federal.

1. The Court of Appeals Decision Directly Conflicts with Decisions of the United States Court of Appeals for the Eighth Circuit.

(a) Direct Conflict.—The court of appeals decision created a direct and expressly acknowledged conflict with decisions of the United States Court of Appeals for the Eighth Circuit which held that state usury claims against a national bank are completely preempted by section 30 of the NBA and thus are properly subject to removal by the national bank. App. 3a n.5 & 13a (citing *Krispin v. May Dep't Stores Co.*, 218 F.3d 919, 922 (8th Cir. 2000); *M. Nahas & Co. v. First Nat'l Bank of Hot Springs*, 930 F.2d 608, 612 (8th Cir. 1991)).[6]

In considering this issue in the *Nahas* case, the Eighth Circuit took note of this Court's determination that "Congress has prescribed in the national banking laws precisely what remedies are available against a national bank for usury, in

[6] The United States Court of Appeals for the Fifth Circuit recently recognized the existence of this conflict. *See Heaton v. Monogram Credit Card Bank of Ga.*, No. 01-30104, 2002 U.S. App. LEXIS 13599, at 2 n.1 (5th Cir. July 8, 2002, revised July 22, 2002) ("The courts of appeals are divided as to whether [12 U.S.C.] §§ 85 and 86 completely preempt state-law usury claims against a national bank so as to confer federal subject-matter jurisdiction over such claims.") (comparing *Anderson*, 287 F.3d 1038, with *Krispin*, 218 F.3d at 922).

order to promote remedial uniformity and to protect national banks from destructive usury penalties frequently available under state law." *Nahas*, 930 F.2d at 610 (citing *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 32-33 (1875)). The Eighth Circuit cited a line of this Court's decisions holding that, "'since Congress has provided a penalty for usury, that action preempts the field and leaves no room for varying state penalties.'" *Id.* (quoting *First Nat'l Bank v. Nowlin*, 509 F.2d 872, 881 (8th Cir. 1975), and citing *McCollum v. Hamilton Nat'l Bank*, 303 U.S. 245 (1938), and *Barnet v. Muncie Nat'l Bank*, 98 U.S. 555 (1879)).

The Eighth Circuit then analyzed removal jurisdiction and the exception to the "well-pleaded complaint" rule provided by the complete preemption doctrine. It relied on this Court's decision in the *Taylor* case for the proposition that the doctrine is "limited to federal statutes that 'so completely pre-empt a particular area, that any civil complaint raising this select group of claims is necessarily federal.'" *Nahas*, 930 F.2d at 612 (quoting *Taylor*, 481 U.S. at 65)). In considering this Court's first complete preemption case, *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968), the Eighth Circuit stated that "*Avco* thus illustrates that this type of removal is most appropriate where Congress has created an exclusive federal remedy that displaces any overlapping or inconsistent state remedies." 930 F.2d at 612. The court held that, since section 30 of the NBA provides an exclusive federal remedy for usury claims against national banks, any civil complaint raising claims of excessive interest against a national bank is "necessarily federal in nature and properly removable." *Id.* at 612. The court added that this result would apply "whether or not [a] plaintiff artfully attempted to couch its complaint wholly in state law terms" and that "a plaintiff cannot thwart the removal of a case by inadvertently, mistakenly or

fraudulently concealing the federal question that would necessarily have appeared if the complaint had been well pleaded." *Id.*[7]

The primary difference in analysis between the Eleventh Circuit's decision below and the Eighth Circuit's contrary decisions is the Eleventh Circuit's requirement of a specific congressional intent to permit removal of cases purporting to be grounded entirely in state law. The Eighth Circuit relies instead on the undisputed congressional intent to federalize all usury claims against national banks and considers that intent to be a sufficient basis for finding federal "arising under" jurisdiction. This difference is at the core of the issue presented to this Court.

(b) Other Conflicting Decisions.—Other circuits have also addressed the issue in conflicting decisions. The Fifth Circuit summarily affirmed a district court decision holding that section 30 of the NBA allows removal of state usury claims under complete preemption. *Battiste v. H&R Block, Inc.*, 209 F.3d 719 (5th Cir. 2000), *aff'g* No. 97-749-A (M.D. La. Jan. 13, 1998) (App. 59a.) However, a divided panel of the Third Circuit decided that complete preemption does not permit removal of a case purporting to assert state usury law against a national bank. *Spellman v. Meridian Bank*, Nos. 94-3203, 94-3204, 94-3215 to 94-3218, 1995 WL 764548, at *6-7 (3d Cir. Jan. 12, 1996), *vacated and set for reh'g en banc*, 1996 U.S. App. LEXIS 2506 (3d Cir. Feb. 16, 1996). The Third Circuit vacated that decision and ordered rehearing en banc. Before the full court could address the issue, however, the plaintiffs dismissed the case.

[7] In its more recent decision in the *Krispin* case, the Eighth Circuit relied on its analysis in the *Nahas* case to affirm a lower court's application of the complete preemption doctrine to usury claims pursuant to section 30 of the NBA. *See* 218 F.3d at 922.

Similar to the Eleventh Circuit opinion below, the majority of the Third Circuit panel in the *Spellman* case adopted a standard for complete preemption requiring a clear and specific congressional intent to permit removal of purported state-law claims. 1995 WL 764548, at *3. The dissenting opinion took the position that such specific congressional intent was not necessary. The dissent stated,

> Congress wrote the National Bank Act in 1864, long before the "well-pleaded complaint" rule and the complete preemption doctrine were enunciated. We could not expect the Congress which enacted the National Bank Act to have discussed the federal question jurisdiction or removal implications of 12 U.S.C. §§ 85 & 86, since neither general federal question jurisdiction nor general removal power existed in 1864. Under these circumstances, the majority's requirement of an explicit showing of congressional intent to allow removal is too strict. Instead we should look to less direct evidence of what Congress intended regarding the role of federal courts in enforcing the National Bank Act.

1995 WL 764548, at *21 (Scirica, J., dissenting) (footnotes omitted). After having examined the legislative history of the NBA, the dissent found that Congress intended for usury claims against national banks to be "governed by a body of federal law which the federal courts would apply." *Id.* at *24. Stating that the usury claims were "a federal case in state wrapping paper," it concluded that removal of the case was proper. *Id.*

Decisions among the district courts are also divided. A number of district courts in other circuits have adopted the Eighth Circuit view that removal is proper. *See Watson v. First Union Nat'l Bank of S.C.*, 837 F. Supp. 146, 149 (D.S.C. 1993) (collecting cases). However, other courts have

remanded cases removed by national banks. *See, e.g., Copeland v. MBNA Am., N.A.*, 820 F. Supp. 537, 541 (D. Colo. 1993).

(c) Consequences of Conflict.—Without a decision of this Court, the conflicting law on this issue will subject national banks to different standards regarding removal depending on the circuit in which they are sued. Where removal is not permitted, national banks will be potentially subject to the vicissitudes of multiple state fora and deprived of the benefits of federal court expertise and federal court uniformity of decision. Their only relief from state court misinterpretations will be a petition for certiorari to this Court, a review not available as of right and generally reserved for issues transcending the rights and duties of the particular litigants. Such disparity of treatment is contrary to the congressional intent to create a uniform, nationwide banking system. *See, e.g., Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15 (1978) ("Congress intended to facilitate . . . a 'national banking system.'"); *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 32 (1875) (stating that section 30 of the NBA creates "a system of regulations [where] [a]ll the parts are in harmony with each other, and *cover the entire subject*")(emphasis added).

The conflict will not be resolved absent a decision of this Court. The district courts in the Eighth and Eleventh Circuits will follow the conflicting mandates of their respective courts of appeals. The Eighth Circuit's position has been firmly established since the *Nahas* decision in 1991. The Eleventh Circuit is unlikely to have another opportunity to consider the issue: district courts within the circuit will remand any usury complaints against national banks purporting to raise state claims alone, and remand orders based on lack of subject matter jurisdiction are generally "not reviewable on appeal or

otherwise." 28 U.S.C. § 1447(d); *see Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995).

The issue at bar is ripe for this Court's review. It is a purely legal issue that has been thoughtfully considered and thoroughly analyzed by the lower courts for over a decade, and the conflicting rulings require resolution by this Court.

2. The Court of Appeals Decision Is Erroneous and Is Inconsistent With This Court's Longstanding Position That All Usury Claims Against National Banks Arise Under Federal Law.

(a) Erroneous Analysis.—The Eleventh Circuit's approach to the complete preemption doctrine is flawed. It requires a determination that Congress specifically intended to permit removal in cases where state claims preempted by a federal statute under the ordinary preemption doctrine are filed in state court. Such intent presumptively would not be expressed in the federal statute itself; if it were, there would be no need for the doctrine of complete preemption—it would be a case of "read the statute." The Eleventh Circuit requires instead that the intent to permit removal of spurious state law claims be discerned from legislative history. The NBA necessarily fails the Eleventh Circuit's test because Congress could not possibly have considered removal in 1864 when it passed the statute: general removal of actions "arising under" federal law had not yet been invented. The NBA fails this test because it was born too soon.

None of the decisions by this Court supports the Eleventh Circuit's analysis. The proper analysis is whether the preemptive force of the federal statute makes the assertion of a state-law claim completely impossible, so that the claim in question must be viewed, despite the plaintiff's characterization, as "arising under" federal law. That depends on the clarity and specificity with which Congress completely federalized the law relating to the claim involved.

In light of this Court's decisions interpreting section 30 of the NBA, it is hard to imagine a clearer case of complete preemption under this approach than that presented by the case at bar and cases like it.

Suits like this one are not rarities; filing them may be a cottage industry of some size. Complaints similar to the complaint in this case are found in a number of reported cases.[8] There may well be others; remand orders may rarely be reported. Why are these cases filed in state court, seeking recovery only under clearly preempted state usury laws? Assuredly the cases are not filed with a view to provide martyrs to the force of the Supremacy Clause through rapid dismissal for failure to state a claim on which relief can be granted. Success, not defeat, presumably motivates these filings. Whether the purpose is to defeat federal removal jurisdiction and then assert a violation of federal law in state court or, more likely, to convince a busy state court judge, with little or no staff, that state law actually applies instead of the federal law, hoping to get a settlement before the case arrives at the state appellate level, is not entirely clear. The latter seems to be the case, since a formal amendment to

[8] *See Jones v. Bankboston, N.A.*, 115 F. Supp. 2d 1350 (S.D. Ala. 2000); *Fortenberry v. Southtrust Bank of Ala. Nat'l Assoc.*, No. CV-95-B-1691-J, 1996 U.S. Dist. LEXIS 21685 (N.D. Ala. 1996); *Moss v. Southtrust Mobile Servs.*, No. CV-95-P-1647-W, 1995 U.S. Dist. LEXIS 21770 (N.D. Ala. 1995); *Hunter v. Rich's Dep't Stores*, 945 F. Supp. 1500 (N.D. Ala. 1995); *Watson v. First Union Nat'l Bank of S.C.*, 837 F. Supp. 146, 149 (D.S.C. 1993); *Copeland v. MBNA Am., N.A.*, 820 F. Supp. 537, 541 (D. Colo. 1993); *Goehl v. Mellon Bank*, 825 F. Supp. 1239 (E.D. Pa. 1993), *rev'd, Spellman v. Meridian Bank*, Nos. 94-3203, 94-3204, 94-3215 to 94-3218, 1995 WL 764548 (3d Cir. Jan. 12, 1996), *vacated and set for reh'g en banc*, 1996 U.S. App. LEXIS 2506 (3d Cir. Feb. 16, 1996); *Ament v. PNC Bank*, 825 F. Supp. 1243 (W.D. Pa. 1992) (same subsequent history); *Nelson v. Citibank (S.D.) N.A.*, 794 F. Supp. 312 (D. Minn. 1992); *Beeman v. Mbank Houston, N.A.*, 691 F. Supp. 1027 (S.D. Tex. 1988).

allege a claim arising under federal law might give rise to a second attempt to remove (or an initial effort to remove, in a circuit like the Eleventh Circuit). Moreover, in the typical case there may well be *no* violation of federal law, and the suits are attempts to collect damages for nonconformity with an inapplicable, preempted state law. What is plain is that, in either case, the procedure is an abuse, and we believe this Court ought to look carefully at a decision, like that of the Eleventh Circuit, which permits, if not encourages, such an abuse.

(b) This Court's Interpretation of Section 30.— The court of appeals decision below failed to recognize the significance of the unbroken line of this Court's decisions dating back to *Farmers' and Mechanics' National Bank v. Dearing*, 91 U.S. 29 (1875), uniformly recognizing that all usury claims against national banks are necessarily federal.[9] These cases demonstrate that the NBA not only preempts state usury claims against a national bank under the ordinary preemption doctrine, but also federalizes any such claims by establishing both an exclusive federal claim and an exclusive federal remedy.

In the seminal *Dearing* case, decided shortly after enactment of the NBA, this Court held that federal standards for national bank interest rates pursuant to section 30 of the NBA establish a federal remedy for usury that precludes state remedies. 91 U.S. at 34. The Court characterized the provisions of section 30 of the NBA as follows: "These clauses, examined by their own light, seem to us too clear to

[9] *See, e.g., Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 737, 744 (1996); *Marquette Nat'l Bank*, 439 U.S. at 308 (1978); *McCollum v. Hamilton Nat'l Bank*, 303 U.S. 245, 245-46, 248 (1938); *Evans v. Nat'l Bank of Savannah*, 251 U.S. 108, 109, 114 (1919); *Haseltine v. Cent. Nat'l Bank of Springfield*, 183 U.S. 132, 134 (1901); *Barnet v. Muncie Nat'l Bank*, 98 U.S. 555, 558-59 (1878); *Dearing*, 91 U.S. 29, 34-35 (1875); *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409, 410-11 (1873).

admit of doubt as to any thing to which they relate. They form a system of regulations. All the parts are in harmony with each other, *and cover the entire subject*." *Id.* at 32 (emphasis added). The Court rejected a construction of the NBA that would permit state law to define remedies for usury by national banks, ruling that "States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Id.* at 34. Moreover, "[t]he power to supplement [section 30] by State legislation is conferred neither expressly nor by implication." *Id.* at 35.

This core principle was reiterated three years later in *Barnet v. Muncie National Bank*, 98 U.S. 555, 558 (1878): "The [state] statutes . . . upon the subject of usury . . . cannot affect the case. Where a statute [the NBA] creates a new right or offence, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive."

Forty years later, in *Evans v. National Bank of Savannah*, 251 U.S. 108 (1919), the Court reiterated its holding in the *Dearing* and *Barnet* cases, stating that "[w]hether transactions by [a national bank] are usurious and the consequent penalties therefor[] *must* be ascertained upon a consideration of the National Bank Act." *Evans*, 251 U.S. at 109 (emphasis added). More recently, the Court has consistently recognized that section 30 of the NBA governs all usury claims against national banks. *See, e.g.*, *Smiley*, 517 U.S. at 737 (1996); *Marquette Nat'l Bank*, 439 U.S. at 318-19 (1978).

Thus, it is clear from the Court's decisions that the NBA not only preempts state claims for usury against a national bank, but also federalizes any such claims. Since Congress intended the NBA to occupy the entire field, all usury actions against national banks necessarily present a question arising under federal law. Artful pleading by plaintiffs in an attempt to cloak the federal claim in state law garb should not preclude removal. As urged in the OCC's *amicus* brief

below, "where [as here] Congress clearly wished to displace state law by creating an exclusive federal remedy and stressed the importance of uniformity in the fledgling national banking system, a finding of complete preemption is appropriate." App. 55a.

(c) This Court's Complete Preemption Cases.—A finding that section 30 of the NBA completely preempts state law usury claims would be consistent with this Court's application of the complete preemption doctrine. To date, the Court has found complete preemption under two statutes: section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968), and section 502(a) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a), *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 63 (1987).

In the first of these cases, *Avco*, the Court said nothing concerning the possible existence of congressional intent to permit removal of claims purporting to arise solely under state law. Instead, it focused its analysis of removal jurisdiction solely on the fact that section 301 of the LMRA, 29 U.S.C. § 185, provided a federal right of action to enforce or construe collective bargaining agreements entered into under federal labor laws. 390 U.S. at 559-60. Finding that state law "will not be an independent source of private rights" in such cases, *id.* at 560, the Court concluded that it was "clear that the claim under [the] collective bargaining agreement is one arising under the 'laws of the United States' within the meaning of the removal statute." *Id.*

In *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23-24 (1983), the Court elaborated on the rationale for the *Avco* decision as follows:

> The necessary ground of decision was that the preemptive force of . . . [the federal statute] is so

> powerful as to displace entirely any state cause of action . . . . Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of . . . [the federal statute]. *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.

The Court determined that complete preemption was not established in the *Franchise Tax Board* case since Congress did not preempt all state causes of action or provide a federal remedy. 463 U.S. at 25-26. The Court had nothing to say about specific congressional intent to permit removal of a purported state-law claim.

In the later *Taylor* case, this Court stated that the complete preemption doctrine permits removal in the following circumstances: "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." 481 U.S. at 63-64. The Court framed the issue as "whether the[] state common law claims are not only pre-empted by ERISA, but also displaced by ERISA's civil enforcement provision, § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), to the extent that complaints filed in state courts purporting to plead such state common law causes of action are removable to federal court under 28 U.S.C. § 1441(b)." 481 U.S. at 60. The Court looked to "whether or not the *Avco* principle can be extended" to the ERISA context. *Taylor*, 481 U.S. at 64. While noting a similarity between the jurisdictional language of ERISA's civil enforcement provisions and that of the LMRA, the Court declared that, absent an "explicit direction from Congress, this question would be a close one." 481 U.S. at 64. The Court did not have to resolve that "close one," finding such explicit direction in the form of legislative

history stating that actions like the one in issue were to be "regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the [LMRA]." *Id.* at 65-66. Accordingly, the Court held that removal was proper. In so holding, this Court did not state that a specific congressional intent to permit removal was prerequisite to a finding of complete preemption; it simply found that there was such a specific intent present there. *See id.* at 65-66.

3. The Issue Is Important to the Uniform and Effective Operation of the National Banking System.

The ability of national banks to remove usury claims against them to the federal courts is vital to the uniform development of the NBA and the uniform treatment of national banks facing usury claims. For this reason, the OCC, the federal government agency charged with interpreting the NBA, supervising all national banks and protecting the safety and soundness of the national banking system, filed an *amicus curiae* brief in the court below strongly urging that national banks should be allowed to remove usury claims purporting to arise under state law pursuant to the complete preemption doctrine. App. 47a-55a. The OCC's participation in the case underscores the importance of the issue to the national banking system. The majority decision below simply ignored the OCC's views.

The NBA was enacted in 1864 to create a national banking system consisting of federally chartered national banks which are "'instrumentalit[ies] of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States.'" *Marquette Nat'l Bank*, 439 U.S. at 308 (quoting *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896)). This Court has repeatedly

stated that, in adopting the NBA, Congress intended to create a uniform nationwide banking system. *See, e.g.*, *id.* at 314-15.

Pursuant to this purpose, Congress adopted a federal standard for interest rates to be charged by national banks (App. 30a) and an exclusive federal remedy for violations of that standard in section 30 of the NBA (App. 32a). As the OCC stated in its *amicus* brief in the court below, this provision was an important feature of the NBA because loans are typically the major assets of a national bank and interest is its principal source of income. App. 48a-49a. Congress clearly intended to protect national banks from state interference in this area: section 30 "was considered indispensable to protect . . . [national banks] against possible unfriendly state legislation." *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409, 412 (1873). Permitting removal of usury claims against national banks is vital to providing such protection and to ensuring the uniform development of the law and its uniform application to national banks, wherever they may be sued.

4. This Case Presents an Opportunity for the Court to Provide Much-Needed Guidance on the Complete Preemption Doctrine.

This Court has not visited the issue of complete preemption in the past fifteen years or outside the contexts of the LMRA and ERISA. As a result, the lower federal courts have adopted differing standards of application. This case would provide a useful vehicle for this Court's resolution of those differences.

Courts and commentators agree that there is great confusion in the lower courts over the application of complete preemption. As the Eleventh Circuit recognized in an earlier case, "[c]ourts . . . have struggled to define the exact contours of the complete preemption doctrine[, and] [t]he results have

varied." *BLAB T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc.*, 182 F.3d 851, 856 (11th Cir. 1999). The Tenth Circuit has noted, "the scope of the doctrine is not entirely clear: '[t]he evolution of the doctrine . . . has been one of fits-and-starts and zig-zags [and] has, not surprisingly, occasioned both confusion and disagreement among the federal circuit and district courts.'" *Schmeling v. NORDAM*, 97 F.3d 1336, 1339 (10th Cir. 1996) (quoting *Burke v. Northwest Airlines, Inc.*, 819 F. Supp. 1352, 1356 (E.D. Mich. 1993) (brackets in original)). Professor Arthur Miller concurs, concluding his examination of cases by declaring that "[t]he application of the complete-preemption doctrine is unclear" because of the Court's failure to "enunciate[] clear principles for identifying completely preempted claims beyond the LMRA and ERISA contexts . . . ." Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 Tex. L. Rev. 1781, 1797 (June 1998).[10]

As a result, there is a broad range of approaches to the complete preemption doctrine among the courts of appeals.[11] One of the primary issues of confusion and conflict among the circuits is the role of congressional intent: whether Congress must specifically intend to permit removal of complaints asserting only state law or rather whether it is sufficient for Congress to intend to create exclusive federal claims and remedies and to leave no room for the states. The latter form of intent was present in each of this Court's two decisions finding complete preemption, while the *Taylor*

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[10] *See also* Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 Wake Forest L. Rev. 927, 929 (1996) (declaring that lower courts are "in a disquieting state of disarray")

[11] For efforts to categorize the lower courts' applications of the complete preemption doctrine, see Jordan, *supra*, at 964-980, and Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 Hastings L.J. 273, 295-303 (1993).

decision (but not *Avco*) also found express attention to removal in the legislative history.

This issue is at the heart of this case. Under the standard requiring express intent to permit removal, adopted by the Eleventh Circuit in its decision below, it is impossible for statutes adopted prior to removal jurisdiction, such as the NBA, to pass muster, and it is extremely difficult for statutes enacted prior to the Court's recognition of complete preemption. While some courts of appeals agree with the Eleventh Circuit that there must be an expression of specific congressional intent to permit removal,[12] other courts of appeals look instead to congressional intent to create a federal claim eliminating all possibility of state-law claims.[13] They

[12] *See, e.g.*, *Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306, 311 (3d Cir. 1994) (stating that a finding of complete preemption requires, in addition to a federal cause of action, a clear showing of congressional intent to permit removal); *cf. Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2d Cir. 1998) (narrowing circuit application of complete preemption doctrine to "the very narrow range of cases where 'Congress has clearly manifested an intent' to make a specific action within a particular area removable.") (quoting *Taylor*, 481 U.S. at 66).

[13] *See, e.g.*, *Strong v. Telectronics Pacing Sys., Inc.*, 78 F.3d 256, 260 (6th Cir. 1996) ("[C]ongressional intent necessary to confer removal jurisdiction upon the federal district courts through complete preemption is expressed through the creation of a parallel federal cause of action that would 'convert' a state cause of action into the federal action for purposes of the well-pleaded complaint rule."); *Schmeling*, 97 F.3d at 1343 (10th Cir.) (considering statute's "provision of a federal cause of action to enforce the [federal law]" as determinative of whether "Congress intended to allow removal in such cases"); *Nahas*, 930 F.2d 608, 612 (8th Cir.) (exclusive federal remedy supports removal under doctrine of complete preemption); *cf. Cahnmann v. Sprint Corp.*, 133 F.3d 484, 490 (7th Cir. 1998) (holding, without specific mention of complete preemption, that federal remedy was exclusive and that "because federal law has extinguished the state law basis under which [the claim] might otherwise arise, the case is removable to federal court even if the plaintiff sedulously avoids mention of federal law in his complaint").

consider that intent sufficient to establish federal "arising under" jurisdiction for purposes of removal.

Where Congress has created an exclusive federal claim and remedy, as in this case, there is no rational reason to assume that Congress meant to tolerate evasions of the defendant's invocation of federal jurisdiction through pleading a patently non-existent state claim.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

[April 3, 2002]

No. 01-11863

MARIE ANDERSON, ALVESTER BRAFORT, *et al.*,
Plaintiffs-Appellants,

v.

H&R BLOCK, INC., Beneficial National Bank, *et al.*,
Defendants-Appellees.

Before TJOFLAT, BARKETT and WILSON, *Circuit Judges*.

WILSON, *Circuit Judge*:

The issue we decide on this appeal is whether the plaintiffs" state-law usury claims are completely preempted by the National Bank Act (NBA), 12 U.S.C. §§ 85 and 86, and therefore properly removable to federal court. Although the plaintiffs alleged only state-law claims in their complaint, the district court determined that it had jurisdiction based on the doctrine of complete preemption. We disagree and reverse.

BACKGROUND

The plaintiffs, who as customers of H&R Block, Inc. had taken out tax refund anticipation loans [1] from Beneficial

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[1] In a tax refund anticipation loan, a customer receives the amount of her anticipated tax refund, less fees charged by the lender and the tax preparation service, and in return authorizes the government to deposit the tax refund directly into an account at the bank to repay the loan.

National Bank, brought suit in state court against H&R Block, Beneficial National Bank, and Beneficial Tax Masters, Inc., alleging usury violations [2] along with other state-law claims. The defendants removed the case to federal court on the basis of federal question jurisdiction. The defendants argued that since the NBA provides the exclusive remedy for claims alleging excessive interest against national banks, the plaintiffs" state-law usury claims should be recharacterized as federal claims under the doctrine of complete preemption. The plaintiffs moved to remand the case back to state court, arguing that while §§ 85 and 86 of the NBA may provide a defense to state-law usury claims, these provisions do not accomplish complete preemption. The district court denied the motion to remand, holding that removal was proper because federal question jurisdiction existed based on complete preemption. Recognizing that the issue was unsettled in this Circuit, the district court certified for interlocutory appeal the question of whether §§ 85 and 86 of the NBA completely preempt state-law usury claims so as to confer removal jurisdiction. We hold that these sections do not accomplish complete preemption.

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[2] The plaintiffs alleged that the defendants charged excessive interest in violation of *Alabama Code* § 8-8-1 and the common-law usury doctrine. In addition to the usury claims, the complaint included claims for intentional misrepresentation, suppression of material facts, and breach of fiduciary duty.

DISCUSSION

The question of whether §§ 85 [3] and 86 [4] of the NBA completely preempt state-law usury claims against a national bank has been the subject of disagreement among other circuits and among district courts within this Circuit.[5] What

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[3] Section 85 provides, "Any [national bank] may take, receive, reserve, and charge on any loan or discount made . . . interest at the rate allowed by the laws of the State . . . where the bank is located. . . ." 12 U.S.C. § 85.

[4] Section 86 provides,

> The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred.

12 U.S.C. § 86.

[5] While the Eighth Circuit has held that § 86 completely preempts state-law usury claims, *M. Nahas & Co. v. First Nat'l Bank of Hot Springs*, 930 F.2d 608, 612 (8th Cir.1991), the Third Circuit disagreed in *Spellman v. Meridian Bank*, 3d Cir.1996, 1995 WL 764548 (Nos. 94-3203, 94-3204, 94-3215 to 94-3218, Jan. 12, 1996), *Rehearing in Banc Granted, Opinion Vacated* (Feb. 16, 1996). After the Third Circuit vacated the panel decision and ordered a rehearing en banc, the parties settled and the complete preemption issue was left undecided. 14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3722.1, at 557 (3d ed.1998).

Within this Circuit, district courts also have reached different results. *Compare Monday v. Coast to Coast Wireless Cable*, M.D. Ala.1997, 1997 WL 114874 (Nos. CV-96-A-1321-N, CV-96-A-1539-N, CV-96-A-1720-N, CV-96-A-1722-N, CV-96-A-1723-N, CV-96-A-1725-N, Feb. 19, 1997) (holding §§ 85 and 86 completely preempt state-law claims within their scope), *with Jones v. Bankboston, N.A.*, 115 F.Supp.2d 1350, 1356-58, 1360 (S.D.Ala.2000) (reaching the opposite conclusion).

is at stake in this inquiry is whether §§ 85 and 86 not only provide a defense to state-law usury claims under ordinary preemption, but also confer on defendants the ability to remove the case from state to federal court under the complete preemption doctrine. For the reasons that follow, we hold that §§ 85 and 86 do not accomplish complete preemption. We begin by describing the complete preemption doctrine and analyzing how the doctrine has been applied by the Supreme Court and this Court. Our analysis reveals that the complete preemption inquiry turns on congressional intent—whether Congress not only intended for a federal statute to provide a defense to state-law claims, but also intended to confer on defendants the ability to remove a case to a federal forum. We conclude that §§ 85 and 86 of the NBA do not accomplish the extraordinary result of complete preemption, because clear congressional intent to permit removal under these sections is lacking.

I

Whether a district court may exercise jurisdiction over this case based on complete preemption is a question of law that we review de novo. *BLAB T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc.*, 182 F.3d 851, 854 (11th Cir. 1999). As courts of limited jurisdiction, lower federal courts may decide a case only when Article III of the Constitution provides that the federal judicial power extends to the case and when Congress has granted jurisdiction. *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 409 (11th Cir. 1999). When a federal court acts outside its jurisdiction, it violates principles of separation of powers and federalism, interfering with Congress"s authority to demarcate the jurisdiction of lower federal courts, and with the states" authority to resolve disputes in their own courts. *Id.* at 409-10. For this reason, when there are doubts as to whether removal jurisdiction is proper, we favor remand of removed cases. *Id.* at 411.

The removal statute, 28 U.S.C. § 1441(a), provides that any civil action brought in state court may be removed to federal court by the defendant as long as the federal court has jurisdiction in the case. Removal based on federal question jurisdiction, the grounds for removal the district court found here, generally is governed by the "well-pleaded complaint" rule, which provides that a case may be removed only if the plaintiff"s properly pleaded complaint reveals that the claim is based on federal law. *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 9- 10, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). Under the well-pleaded complaint rule, a case in which the plaintiff asserts only state-law claims may not be removed to federal court based on the existence of a federal defense—even the defense of ordinary preemption. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). "Congress has long since decided that federal defenses do not provide a basis for removal." *Id.* at 399, 107 S.Ct. 2425.

An exception to the well-pleaded complaint rule is the "complete preemption" doctrine. *BLAB T.V.*, 182 F.3d at 854. Under this doctrine, a defendant may remove a case to federal court even though the plaintiff raises only state-law claims in her complaint, when "the pre-emptive force of a [federal] statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule."[6] *Caterpillar*

[6] We have recognized that the doctrine of complete preemption often is confused with the defense of ordinary federal preemption. *BLAB T.V.*, 182 F.3d at 854-55. Ordinary preemption is a defense that may be raised in state court as well as in federal court. *Id.* at 855. As a defense, ordinary preemption does not appear in the plaintiff"s well-pleaded complaint, and thus does not give the defendant the ability to remove a case to federal court. *Caterpillar Inc.*, 482 U.S. at 393, 107 S.Ct. 2425. Unlike the defense of ordinary preemption, the doctrine of complete preemption gives a defendant the ability to remove the case to federal court. *BLAB T.V.*, 182 F.3d at 854.

Inc., 482 U.S. at 393, 107 S.Ct. 2425 (internal quotation marks omitted).

The Supreme Court has found complete preemption under two federal statutes—section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, and section 502(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a). *BLAB T.V.*, 182 F.3d at 855. The complete preemption doctrine was born with little elaboration or explanation in *Avco Corp. v. Aero Lodge Number 735, International Association of Machinists and Aerospace Workers*, 390 U.S. 557, 560-62, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968), where the Supreme Court treated the plaintiff's state-law claim based on a collective bargaining agreement as a federal claim arising under section 301 of the LMRA, and held that the case was properly removed to federal court. The Supreme Court had not yet begun to use the term "complete preemption" to describe this result, and *Avco* provides little guidance on the scope of the complete preemption doctrine.[7]

[7] Karen A. Jordan, in *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 Wake Forest L.Rev. 927, 951 (1996), remarked that the Supreme Court in *Avco* "provided limited insight into the justification for its holding," since the Court "did not mention the well-pleaded complaint rule, nor did it explain why this case fell outside that rule." The Court explained the *Avco* decision in *Franchise Tax Board*, stating, "The necessary ground of decision was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization. Any such suit is purely a creature of federal law. . . ." 463 U.S. at 23, 103 S.Ct. 2841 (footnote omitted) (internal quotation marks omitted).

Some courts describe as another example of complete preemption the Supreme Court"s decision in *Oneida Indian Nation of New York State v. Oneida County*, 414 U.S. 661, 667, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) (agreeing with the Oneida Indian Nation that federal question jurisdiction existed over its right-to-possession claimbecause the possessory rights of Indian tribes necessarily arise under federal law and treaties). *BLAB T.V.*,

The Supreme Court provided more guidance on the contours of the complete preemption doctrine when it cautiously extended the doctrine to section 502(a) of ERISA in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 64-67, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987). The Court said that without clear indications that Congress intended to permit removal of state claims that fell within the scope of ERISA"s civil enforcement provision in section 502(a), the Court would have been "reluctant" to expand the "extraordinary pre-emptive power" recognized by the *Avco* decision under section 301 of the LMRA. *Id.* at 65, 107 S.Ct. 1542. After examining section 502(a), however, the Court did find clear indications of congressional intent to permit removal—explicit statements in the legislative history that Congress meant for this provision to be construed in the same fashion as section 301 of the LMRA, and close parallels between the jurisdictional subsection of ERISA"s civil enforcement provision and section 301 of the LMRA. *Id.* at 65-66, 107 S.Ct. 1542. Because Congress "clearly manifested an intent to make [these] causes of action . . . removable to federal court," the Supreme Court felt bound to "honor that intent" and find complete preemption. *Id.* at 66, 107 S.Ct. 1542.

Outside the contexts of the LMRA and ERISA, this Court has addressed the question of complete preemption only twice, in *Smith v. GTE Corp.*, 236 F.3d 1292, 1310-13 (11th Cir.2001) (holding that the Federal Communications Act did not accomplish complete preemption), and *BLAB T.V.*, 182 F.3d at 857-59 (holding that the Cable Communications Policy Act did not accomplish complete preemption). In those cases, we recognized that the complete preemption doctrine should be carefully limited in scope. We noted that "although the Supreme Court recognizes the existence of the

182 F.3d at 855 n. 2. *Oneida Indian Nation*, like *Avco*, does not use the term "complete preemption" and provides little guidance on when a court should or should not apply the complete preemption doctrine.

complete preemption doctrine, the Court does so hesitatingly and displays no enthusiasm to extend the doctrine into areas of law beyond the LMRA and ERISA." *Id.* at 856. We recognized that the Supreme Court only "reluctant[ly]" extended the complete preemption in *Taylor*, based on "virtually identical" jurisdictional provisions in the LMRA and ERISA and explicit statements in the legislative history of ERISA that the two statutes should be construed in a like manner. *Id.* at 855 (alteration in original) (internal quotation marks omitted). Finding no similar clear manifestation of congressional intent to permit removal in *BLAB T.V.* or *Smith*, we held that the complete preemption doctrine did not create federal jurisdiction in those cases. *Smith*, 236 F.3d at 1313; *BLAB T.V.*, 182 F.3d at 858.

In determining whether Congress intends for a federal statute to completely preempt state-law claims, courts consider a variety of factors such as "whether the state claim is displaced by federal law under an ordinary preemption analysis, whether the federal statute provides a cause of action, what kind of jurisdictional language exists in the federal statute, and what kind of language is present in the legislative history to evince Congress"s intentions." *BLAB T.V.*, 182 F.3d at 857. While we have declined to adopt a specific test for this Circuit, we recognize that all of these tests have the same ultimate goal:

> "to determine whether Congress not only intended a given federal statute to provide a federal defense to a state cause of action that could be asserted either in a state or federal court, but *also intended to grant a defendant the ability to remove* the adjudication of the cause of action to a federal court by transforming the state cause of action into a federal [one]."

Id. (emphasis added) (alteration in original) (quoting Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition,* 76 Tex. L.Rev. 1781, 1797-98 (1998)). In sum, both the

Supreme Court and this Court have recognized that the "touchstone" of the complete preemption inquiry is congressional intent. *Taylor*, 481 U.S. at 66, 107 S.Ct. 1542; *BLAB T.V.*, 182 F.3d at 857.

II

Since congressional intent is the pivotal issue in the complete preemption inquiry, that is where we must focus our analysis of whether §§ 85 and 86 of the NBA completely preempt state-law usury claims against a national bank. In enacting the NBA, did Congress merely intend for federal law to act as a defense to state-law usury claims against a national bank under ordinary preemption—a defense that just as well could be asserted in state court and applied by state judges? Or did Congress intend that national banks facing usury claims in state court should have the ability to remove the case to a federal forum?

The defendants argue that it would be impossible for a court to find in the NBA the striking indications of congressional intent to permit removal through complete preemption that the Supreme Court relied on in *Taylor*, because the NBA was enacted more than a decade before Congress gave federal courts general federal question jurisdiction, more than two decades before the development of the well-pleaded complaint rule, and more than a century before the articulation of the complete preemption doctrine.[8] Nonethe-

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[8] The Judiciary Act of 1875 gave lower federal courts general federal question jurisdiction and general removal jurisdiction in civil cases arising under the Constitution or federal law. Donald H. Zeigler, *Twins Separated at Birth: A Comparative History of the Civil and Criminal Arising Under Jurisdiction of the Federal Courts and Some Proposals for Change*, 19 Vt. L.Rev. 673, 735-37 (1995). Between 1875 and 1887, when the Act was amended, "the well-pleaded complaint rule was not applied in full force to cases removed from state court; the defendant's petition for removal could furnish the necessary guarantee that the case necessarily presented a substantial question of federal law." *Franchise*

less, the defendants argue that applying the complete preemption doctrine here would be consistent with Congress"s purposes because the historical context of the NBA indicates that Congress was suspicious of state interference with national banks.

The NBA was enacted in 1864 [9] in the midst of economic strife during the Civil War. The defendants cite to many statements in the congressional debates surrounding the enactment of the NBA that show Congress"s intent to protect the new national banks from unfriendly state legislation. For example, Representative Samuel Hooper of Massachusetts argued that the NBA was necessary so "the currency of the country may be within the control and regulation of a national law applicable to the whole country, instead of being controlled and regulated by State law as it has been heretofore," and stated, "I appeal to the members of the House, and I ask them if they can excuse themselves to their constituents and to posterity if they sacrifice the great interests that are now at stake to the comparatively petty interest of local banking." Cong. Globe, 38th Cong., 1st Sess. 1451 (1864). Based on statements like this from the congressional debates, the defendants ask us to adopt the reasoning of Judge Anthony J. Scirica in his dissent in *Spellman v. Meridian Bank*, 3d Cir.1996, 1995 WL 764548 (Nos. 94-3203, 94-3204, 94-3215 to 94-3218, Jan. 12, 1996) (Scirica, J., dissenting), *Rehearing in Banc Granted, Opinion Vacated*

Tax Bd., 463 U.S. at 10 n. 9, 103 S.Ct. 2841. However, since 1887, "[f]or better or for worse . . . a defendant may not remove a case to federal court unless the *plaintiff*'s complaint establishes that the case "arises under" federal law." *Id.* at 10, 103 S.Ct. 2841.

[9] Act of June 3, 1864, 13 Stat. 99 (repealing and superseding the similar Act of Feb. 25, 1863). The Act originally was titled "An Act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," but its title was changed in 1874 to "The National Bank Act." 12 U.S.C. § 38.

(Feb. 16, 1996): that Congress clearly intended that the NBA alter federal state relations and protect national banks from state interference, and therefore the NBA completely preempts state law because "'Congress intended to have usury claims against national banks governed by a body of federal law which the federal courts would apply.'" 14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3722.1, at 557 (3d ed.1998) (quoting *Spellman*, 1995 WL 764548, at *24 (Scirica, J., dissenting)).

While the congressional debates amply demonstrate Con gress's desire to protect national banks from state legislation, they do not demonstrate that Congress desired to protect national banks from facing suit in state court. *Jones v. Bankboston, N.A.*, 115 F.Supp.2d 1350, 1360 (S.D.Ala.2000) (acknowledging that the NBA was meant to protect against "unfriendly legislation by the States," but stating that "the evidence does not demonstrate . . . that Congress was so distrustful of the states" *judicial* systems"). Even before 1875, when Congress gave lower federal courts original federal question jurisdiction and general removal jurisdiction, Congress had provided in a handful of specific acts that federal law would both provide a defense and allow for removal from state to federal court.[10] When Congress enacted the NBA in 1864, it provided that suit could be

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[10] For instance, in the Act of March 3, 1863, 12 Stat. 755 (amended by the Act of May 11, 1866, 14 Stat. 46), Congress provided for a federal defense and provided the right of removal of civil or criminal actions arising out of acts committed under federal authority during the Civil War. *See Mayor & Aldermen of City of Nashville v. Cooper*, 73 U.S. (6 Wall.) 247, 251, 18 L.Ed. 851 (1867); Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 Iowa L.Rev. 717, 720-21 (1986). The pre-1875 removal statutes are collected in Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 61-62 n. 22 (1927), and discussed in Stanley I. Kutler, *Judicial Power and Reconstruction Politics* 143-60, 168 (1968).

brought in federal or state court, and it did not provide for removal.[11] Four years later, in the Act of July 27, 1868, Congress allowed for corporations organized under federal law to remove a case from state to federal court by filing a petition that they had a defense arising under federal law—but by amendment, Congress excepted national banks from this removal power. 15 Stat. 226-27 ("*And be it further enacted*, That any corporation, or any member thereof, *orther* [other] than a banking corporation, organized under a law of the United States, and against which a suit at law or in equity has been or may be commenced in any court other than a circuit or district court of the United States, for any liability or alleged liability of such corporation, or any member thereof as such member, may have such suit removed from the court in which it may be pending, to the proper circuit or district court of the United States, upon filing a petition therefor, verified by oath, either before or after issue joined, stating they have a defence arising under or by virtue of the Constitution of the United States, or any treaty or law of the United States . . . ." (alteration in original)). *See also* Cong. Globe, 40th Cong., 2d Sess. 4197-98 (1868); 7 Charles Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88, Part Two*, 394-97 (1987). This legislative history compels us to reject the

[11] Although the 1863 Act provided for suit in federal court and did not mention state court, *see Mercantile Nat"l Bank at Dallas v. Langdeau*, 371 U.S. 555, 558-59, 83 S.Ct. 520, 9 L.Ed.2d 523 (1963), when Congress replaced the 1863 Act in 1864, section 57 of the Act provided for suit in either federal or state court: "'[S]uits, actions and proceedings, against any association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established; or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases. . . .'" *Id.* at 568, 83 S.Ct. 520 (quoting 13 Stat. 116-17).

defendants" suggestion that the early history of national banks offers clear congressional intent to make claims under the NBA removable.

Since both the Supreme Court and this Court have recognized that congressional intent is the "touchstone" in the complete preemption inquiry, we also must reject the line of cases which have found complete preemption without inquiring into Congress's intent. The only circuit court opinions that are consistent with this suggestion are *M. Nahas & Co. v. First National Bank of Hot Springs*, 930 F.2d 608, 612 (8th Cir.1991), and *Krispin v. May Department Stores Co.*, 218 F.3d 919, 922 (8th Cir.2000), which follows the M. Nahas & Co. reasoning. Without examining congressional intent, the Eighth Circuit found complete preemption in *M. Nahas & Co.* based solely on well-settled law that § 86 provides the exclusive remedy for usury claims against a national bank.[12] 930 F.2d at 612. However, in *Jones*, Chief District Judge Charles R. Butler, Jr. criticized the Eighth Circuit"s lenient complete preemption standard as inconsistent with Supreme Court and Eleventh Circuit precedent and held that the NBA did not completely preempt state-law usury claims so as to

[12] Federal law governs the amount of interest a national bank may charge, *Marquette Nat"l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 308, 99 S.Ct. 540, 58 L.Ed.2d 534 (1978), and provides the exclusive remedy for usury claims against a national bank, *McCollum v. Hamilton Nat"l Bank of Chattanooga*, 303 U.S. 245, 247, 58 S.Ct. 568, 82 L.Ed. 819 (1938); *Evans v. Nat"l Bank of Savannah*, 251 U.S. 108, 109, 40 S.Ct. 58, 64 L.Ed. 171 (1919); *Farmers" & Mechanics" Nat"l Bank v. Dearing*, 91 U.S. 29, 32, 23 L.Ed. 196 (1875). But this does not provide an answer to the complete preemption inquiry—" "[C]omplete preemption principally determines not whether state or federal law governs a particular claim, but rather whether that claim will, irrespective of how it is characterized by the complainant, [serve as the basis for federal question jurisdiction].'" *BLAB T.V.*, 182 F.3d at 855 (alteration in original) (quoting *McClelland v. Gronwaldt*, 155 F.3d 507, 517 (5th Cir.1998)).

allow for removal. 115 F.Supp.2d at 1361. We consider *Jones* to be a sound application of the principles reflected in the complete preemption cases decided by the Supreme Court and this Court, and we take a similar approach here.

In *Jones,* the court concluded that the sole justification the *M. Nahas & Co.* holding—that § 86 provides the exclusive remedy for usury claims against a national bank—was not by itself sufficient to establish complete preemption. *Id.* at 1355-56. The court in *Jones* arrived at this conclusion by examining the Supreme Court"s analysis in *Taylor,* where before beginning its complete preemption inquiry, the Supreme Court acknowledged that ERISA preempted the plaintiff"s state-law claims and provided an alternative federal remedy. *Id.* at 1356 (citing *Taylor,* 481 U.S. at 64, 107 S.Ct. 1542). "Were the existence of an "exclusive federal remedy" the only requirement for complete preemption, the . . . Court would have concluded its analysis at this point and declared the plaintiff"s claims completely preempted." *Id.* However, the *Taylor* Court went on to say that it would be "reluctant" to find complete preemption on this basis alone. 481 U.S. at 65, 107 S.Ct. 1542. The *Taylor* Court then conducted a searching inquiry into congressional intent, focusing on the parallels to the LMRA and explicit statements in the legislative history that ERISA should be construed like the LMRA to find Congress had "clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court." *Id.* at 66, 107 S.Ct. 1542. The *Jones* court concluded—and we agree—that the analysis in *Taylor* indicates that where there are no further indications of congressional intent to permit removal, the existence of an exclusive federal remedy generally will not be enough to achieve complete preemption. 115 F.Supp.2d at 1356.

The *Jones* court also noted that this Court uses a more demanding standard for complete preemption than the Eighth

Circuit used in *M. Nahas & Co. Id.* at 1355-56. "[T]he only justification offered by the *Nahas* Court for its ruling was that the National Bank Act accomplishes "ordinary" preemption of state law claims for excessive interest and provides an alternative federal cause of action for the preempted state claim." *Id.* at 1355. We previously have recognized that the mere provision of a federal cause of action cannot be dispositive in the complete preemption inquiry:

> If the creation of a federal cause of action served as the sole litmus test for congressional intent, complete preemption would apply to every federal statute that creates such a cause of action and complete preemption would be common rather than extraordinary. . . . Congress may create a federal cause of action without also providing sufficient evidence of its intent that state causes of action are to be considered as arising under the federal statute and thus removable to federal court.

BLAB T.V., 182 F.3d at 859 n. 3. Our precedent demands clear congressional intent to permit removal. Like the Supreme Court, we have not yet extended the complete preemption doctrine beyond section 301 of the LMRA and section 502(a) of ERISA. We cannot extend the complete preemption doctrine here, where clear congressional intent to permit removal is lacking.

CONCLUSION

Under our federal system, both state and federal courts are entrusted to faithfully follow federal law. *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 247-48, 73 S.Ct. 236, 97 L.Ed. 291 (1952) ("State courts are bound equally with the federal courts by the Federal Constitution and laws."). State courts in Alabama—the forum from which the defendants sought removal—have a long history of faithfully applying the NBA. *E.g., Lowery v. First Nat'l Bank of Oneonta,* 239 Ala. 690, 196 So. 891, 892 (1940)

("The penalties imposed upon a national bank for charging a higher rate of interest than allowed by the law of the state where located are fixed by the Federal Banking Law."); *Florence R.R. & Improvement Co. v. Chase Nat"l Bank,* 106 Ala. 364, 17 So. 720, 721 (Ala.1895) ("[T]he penalty prescribed by the national banking statute for usurious discounting paper by national banks is exclusive, and those imposed by state statutes cannot be applied and enforced."); *Helms v. First Ala. Bank of Gadsden, N.A.,* 386 So.2d 450, 452 (Ala.Civ.App.1980) ("[S]ince Congress has provided the penalty for usury [with § 86], that action preempts the field, leaving no room for varying state penalties.").

Because state courts, like federal courts, are competent in determining when state-law claims are preempted by federal law, removal to a federal forum based on the doctrine of complete preemption has been the exception, not the rule. Recognizing that the complete preemption doctrine works to trump the well-pleaded complaint rule as well as the maxim that a plaintiff is the master of the complaint and may avoid a federal forum by relying exclusively on state law, the Supreme Court expanded the doctrine only "hesitatingly" when there was a clear showing of congressional intent to permit removal. *BLAB T.V.,* 182 F.3d at 856. Since we find no clear congressional intent to permit removal under §§ 85 and 86 of the NBA, we therefore hold that while these sections may provide a defense to state-law usury claims, they do not accomplish complete preemption so as to permit removal.

We therefore REVERSE the district court's order denying the plaintiffs' motion to remand and REMAND to the district court for further proceedings consistent with this opinion.

TJOFLAT, *Circuit Judge, dissenting*:

The majority decides today that the provisions in the National Bank Act ("NBA") addressing usurious interest, 12 U.S.C. §§ 85 and 86, do not completely preempt plaintiffs" state law claims, and, as a result, the claims are not removable to federal court. The majority bases this conclusion on an absence of legislative history confirming that the NBA"s drafters intended that cases of usurious interest be heard and decided in a federal forum. I do not disparage the majority"s emphasis on congressional intent as the touchstone of complete preemption analysis. Rather, I take issue with the majority"s narrow conception of congressional intent as something only inferable from an enactment"s legislative history, here the NBA"s. Sometimes Congressional intent is determined by looking to statutes already on the books.[1] In this case, I suggest that the Judiciary Act of 1789 ("Judiciary Act" or "Act"), ch. 20, § 9, 1 Stat. 76-77 (1789), is highly relevant in determining whether the drafters of the NBA intended that lawsuits seeking relief from usurious interest rates, which is what the plaintiffs seek here, be litigated in a federal forum.

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[1] "We do not start from the premise that [the statutory] language is imprecise. Instead, we assume that in drafting this legislation, Congress said what it meant." *United States v. LaBonte,* 520 U.S. 751, 757, 117 S.Ct. 1673, 1677, 137 L.Ed.2d 1001 (1997). Likewise, our own precedent directs us to "begin our construction of [a statutory provision] where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision." *Harris v. Garner,* 216 F.3d 970, 972 (11th Cir.2000) (en banc). Legislative history is an oft-used and important tool in the task of statutory interpretation when ambiguities exist in the language. Still, "[w]hen the import of words Congress has used is clear . . . we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language." *Id.* at 976.

The Judiciary Act, enacted by the first Congress, established the federal judiciary. It created thirteen judicial districts, which became the organizational units of the lower federal courts. The degree of precision in language employed by the drafters of the Act indicates that they had a strong understanding of jurisdictional principles and their role in case management and development of the law. For some federal causes, they gave exclusive jurisdiction to the federal courts; for others, they provided that the district courts would have concurrent jurisdiction with *1049 the state courts.[2] Where the drafters saw the need for uniformity of decision or avoidance of state interference, they gave the district courts exclusive jurisdiction. "[S]uits for penalties and forfeitures incurred, under the laws of the United States" were put squarely in that category. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 76-77 (1789).

We must assume that Congress was well aware of this provision—in particular, the word "forfeiture"—when, seventy-four years later, in the midst of the Civil War, it enacted the NBA. Section 85, as reproduced by the majority in note four, defines usurious interest by relying on specific discount commercial paper rates or state rates. Section 86 provides a cause of action for a debtor who was wrongly charged, or who has already paid, such interest on a loan. Although the majority duplicated section 86 in note five, it is useful to do so again for purposes of focusing on the specific language employed:

> The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a *forfeiture* of the entire interest which the note, bill, or other evidence

[2] For example, concurrent jurisdiction was provided with respect to "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act, ch. 20, § 9(b), 1 Stat. 77 (1789).

> of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid . . . may recover back, in an action in the nature of an action of debt, *twice the amount of the interest thus paid.*

12 U.S.C. § 86 (emphasis added). In sum, section 86 furnishes a victim of usurious interest two possible remedies: (1) the victim can obtain a judgment declaring *forfeiture* of the entire interest of the debt if usurious interest is sought; or (2) if such interest has already been paid, the victim may bring a suit to recover twice the amount collected as a *penalty* to the lender.

In the case before us, the plaintiffs claim that Beneficial National Bank, a national banking association, charged them usurious interest rates on tax refund anticipation loans. Plaintiffs" allegations are so unspecific that it is difficult to say whether the plaintiffs are seeking the forfeiture of the interest they are being charged or whether they are seeking twice the amount of interest they have paid or whether they are pursuing both remedies. I say this because there are twenty-six plaintiffs and the complaint does not tell us, with respect to any of the plaintiffs, (1) when the loan was made, (2) the terms of the loan, and (3) the status of the loan--that is, whether the plaintiff had paid any interest, and if so, how much, prior to filing suit. I assume that the plaintiffs" loans have not been paid in full. Therefore, to the extent they have paid interest, they are seeking, in the words of section 86, "twice the amount of the interest paid" and "forfeiture" of the amount still due.

The only way to avoid the operation of the Judiciary Act"s mandate that "suits for penalties and forfeitures incurred" be filed in federal court is to say that the NBA amended that mandate by implication.[3] In light of our statement in *Patel v.*

[3] Although the majority does not mention the Judiciary Act "suits for penalties and forfeitures" provision, and therefore does not discuss

Quality Inn South, 846 F.2d 700, 704 (11th Cir.1988), that "amendments by implication are disfavored," I suggest that this method of avoiding the Judiciary Act"s mandate is unavailable, and that the Act"s mandate should therefore dictate our decision.[4]

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whether the NBA amended that provision by implication, the majority does say that the reference to state courts in the NBA's "Venue of suits" provision forecloses the argument that the federal courts have exclusive jurisdiction of a claim of usury.

[4] That the majority has not considered the application of the Judiciary Act in this case is not surprising. As far as I know, no court faced with the jurisdiction issue we are deciding has considered the relevance of the Judiciary Act provision I rely on here. *See e.g., Spellman v. Meridian Bank,* 1995 WL 764548 (Nos. 94-3203, 94-3402, 94-3215 to 94-3218) (3d Cir.1996) (vacated on grant of rehearing en banc then appeal dismissed by parties after settlement); *M. Nahas. & Co. v. First. Nat"l Bank,* 930 F.2d 608 (8th Cir.1991); *Jones v. Bankboston, N.A.,* 115 F.Supp.2d. 1350 (S.D.Ala.2000).

APPENDIX B

UNITED STATES DISTRICT COURT
M.D. ALABAMA
NORTHERN DIVISION

[Filed Dec. 14, 2000]

No. CIV.A.00-A-1457-N

MARIE ANDERSON, *et al.*,
Plaintiffs,

v.

H & R BLOCK, INC.; Beneficial National Bank; and Beneficial Tax Masters, Inc.,
Defendants.

MEMORANDUM OPINION AND ORDER

ALBRITTON, *Chief Judge*.

I. INTRODUCTION

This cause is now before the court on a Motion to Remand, filed by the Plaintiffs, Marie Anderson, Alvester Brafort, Walter Brutley, Patricia Coleman, Talaya Cope, Audrey Darby, Annie Davis, April DeLoach, Diane Franklin, Lillie Franklin, Willie Lewis, Caledonia Jackson, Shirley Jernigan, Evelyn Nelson, Willie Lawrence, Mamie Mitchell, Betty Person, Diane Peterson, Gwen Rogers, William Screws, Ernestine Starks, Gerald Stokes, Albert Thomas, Charles Thomas, Kenneth Williams, and Earline Young ("Plaintiffs") on November 22, 2000.

The Plaintiffs originally filed a Complaint against H & R Block, Inc.; Beneficial National Bank; and Beneficial Tax Masters, Inc. in the Circuit Court of Barbour County,

Alabama. The Complaint alleges counts of intentional misrepresentation (Court One); suppression of material facts (Count Two); breach of fiduciary duty (Count Three); usury violations (Count Four); and Alabama Code Violations (Count Five).

H & R Block, Inc. ("H & R Block"), and Beneficial National Bank and Beneficial Tax Masters (collectively "Beneficial") filed a Notice of Removal in this court on October 24, 2000. Removal was based upon the presence of a federal question through complete pre-emption under the National Bank Act ("NBA"). The Plaintiffs state they have asserted only state law claims and contest that the NBA completely pre-empts these claims.

For the reasons herein discussed, the Motion to Remand is due to be DENIED.

II. FACTS

The Plaintiffs' claims arise out of representations made and interest and fees charged in connection with loans made to them through H & R Block by Beneficial. According to Beneficial, these loans were tax refund anticipation loans which are loans made to a tax return preparation service by a bank in the amount of the customer's anticipated tax refund, less the fees charged by the lender and the tax preparation service.

The Plaintiffs allege that the Defendants charged each of them interest in excess of the legal limit on interest rates allowed under Alabama law and the common law doctrine of usury. The Plaintiffs also allege that the Defendants misrepresented and failed to disclose the interest rate and the fees that would be charged, and breached their fiduciary duties to the Plaintiffs.

III. REMAND STANDARD

Federal courts are courts of limited jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 114 S.Ct. 1673, 1675, 128 L.Ed.2d 391 (1994); *Burns v. Windsor Insurance Co.*, 31 F.3d 1092, 1095 (1994); *Wymbs v. Republican State Executive Committee*, 719 F.2d 1072, 1076 (11th Cir.1983), *cert. denied*, 465 U.S. 1103, 104 S.Ct. 1600, 80 L.Ed.2d 131 (1984). As such, federal courts have the power only to hear cases that they have been authorized to hear by the Constitution or the Congress of the United States. *See Kokkonen*, 114 S.Ct. at 1675. Because federal court jurisdiction is limited, the Eleventh Circuit favors remand of removed cases where federal jurisdiction is not absolutely clear. *See Burns*, 31 F.3d at 1095.

IV. DISCUSSION

Removal of a case to federal district court by a defendant is only proper if the case brought by the plaintiff in state court originally could have been brought in federal court. *See* 28 U.S.C. § 1441(a). In this case, Beneficial and H & R Block argue that the court has jurisdiction over the Plaintiffs' claims because of the presence of a federal question. Federal question jurisdiction requires that the action arise under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. In deciding whether a federal question exists, the court must apply the well-pleaded complaint rule whereby the court looks to the face of the complaint, rather than to any defenses asserted by the defendant. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). Consequently, the general rule is that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption. *See Caterpillar*, 482 U.S. at 393, 107 S.Ct. 2425. In this case, the Plaintiffs have only asserted state law claims so that, on the face of the Complaint, there is no federal question jurisdiction.

There is, however, an exception, or corollary, to the well-pleaded complaint rule and it is this exception to which Beneficial and H & R Block point in claiming that this court has federal question jurisdiction. This exception is known as the "complete pre-emption" doctrine. This exception is recognized in the rare instance Congress so "completely pre-empts a particular area that any civil complaint . . . is necessarily federal in character." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987). The situations in which the complete pre-emption exception applies are so rare that the Supreme Court has found complete pre- emption in only a few areas. *See Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968) (§ 301 of the LMRA completely pre-empted a state cause of action for violation of contracts); *Metropolitan Life*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (§§ 502(a)(1)(B) and 502(f) of ERISA completely pre-empted state contract and tort claims); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) (federal law pre-emption with regard to tribal lands).

Beneficial and H & R Block have argued for the application of the complete pre-emption doctrine in the instant case based on §§ 85 and 86 of the National Banking Act ("NBA"). The NBA states in part, that a national bank "may . . . charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is located. . . ." 12 U.S.C. § 85. The NBA further provides for a civil enforcement mechanism. *See* 12 U.S.C. § 86.

Beneficial and H & R Block cite several cases, including a previous decision of this court, holding that §§ 85 and 86 of the NBA completely pre-empt state-law claims challenging interest charged by a national bank, and thus that such claims are removable from state to federal court. *See e.g., M. Nahas & Co. Inc. v. First Nat'l Bank of Hot Springs*, 930 F.2d 608

(8th Cir.1991); *Monday v. Coast to Coast Wireless Cable*, 1997 WL 114874 (M.D.Ala. Feb.19, 1997); *Hunter v. Rich's Dept. Stores*, 945 F.Supp. 1500 (N.D.Ala.1995) (Propst, J.). There is, however, contrary case law on the issue of whether the NBA completely pre-empts state law claims challenging excessive interest. *See e.g., Jones v. Bankboston, N.A.*, 115 F.Supp.2d 1350 (S.D.Ala.2000).

The Eleventh Circuit recently addressed for the first time the issue of complete pre-emption outside of the Labor Management Relations Act ("LMRA") and the Employees Retirement Insurance Security Act ("ERISA") context. *See BLAB T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc.*, 182 F.3d 851, 855 (11th Cir.1999)(finding no complete pre-emption under the Cable Communications Policy Act of 1984). In *BLAB T.V.*, the Eleventh Circuit examined the different tests employed by various circuits in assessing complete pre-emption arguments. *Id.* at 856. While the court declined to adopt any of the tests to be applied to all future claims of complete pre-emption, the court did note that, while it relied heavily on a particular decision of the Tenth Circuit, it did not adopt the view of the Tenth Circuit that a statute's providing a federal cause of action is dispositive on the issue of congressional intent. *Id.* at 859, n. 3. The Eleventh Circuit held that a state law claim was not completely preempted by the Cable Communications Policy Act of 1984 because the court found that the requisite congressional intent to convert state law claims into federal claims was absent. *Id.* at 859.

This court has been presented with complete pre-emption arguments under the NBA on two previous occasions, both of which were decided before the *BLAB T.V.* decision by the Eleventh Circuit. *See Monday v. Coast to Coast Wireless Cable*, 1997 WL 114874 at *1 (M.D.Ala., Feb. 19, 1997); *Mason v. Fidelity Federal Bank*, 40 F.Supp.2d 1340 (M.D.Ala.1999).

In *Monday*, this court, relying on complete pre-emption analysis in other cases, looked at three factors: Congressional intent, whether the NBA displaced state law claims with a federal cause of action, and whether the jurisdictional language of the civil enforcement provisions paralleled the LMRA and ERISA. *Monday*, 1997 WL 114874 at *6-7. Noting that the NBA pre-dated the existence of federal question jurisdiction, the well-pleaded complaint rule, and the complete pre-emption doctrine, this court relied on discussions of Congressional intent in binding case law. *Id.* at *6. This court relied on statements in Supreme Court and former Fifth Circuit cases that the NBA was intended to give advantages to national banks over state competitors, and that an action stating a claim of usury against a national bank is a new right which is regulated by federal law, in concluding that Congress intended for national banks to be governed by national standards, not state law. *Id.* (citing *Roper v. Consurve*, 578 F.2d 1106 (5th Cir.1978), *aff'd sub nom. on other grounds, Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980); *Marquette Nat. Bank of Minneapolis v. First Omaha Service Corp.*, 439 U.S. 299, 99 S.Ct. 540, 58 L.Ed.2d 534 (1978); *Farmers' and Mechanics' National Bank v. Dearing*, 91 U.S. 29, 35, 1 Otto 29, 23 L.Ed. 196 (1875)). This court further concluded that the jurisdictional language of the NBA was similar enough to the language used in the LMRA and ERISA, statutes which the Supreme Court has found completely preempt state law, to indicate that Congress intended for the federal remedy provided in the NBA to be the remedy which was available against national banks, whether the forum be federal or state, there being no mechanism for removal to federal court at the time. *Id.* at *7.

Although this court did not have the analysis in *BLAB T.V.* before it when *Monday* was decided, the court finds that the *BLAB T.V.* decision does not alter its conclusion in *Monday* that §§ 85, 86 completely preempt state law claims claiming

usurious interest. The Eleventh Circuit merely underscored the importance of Congressional intent in *BLAB T.V.*, and as noted above, this court's analysis in *Monday* was premised in large part on Congressional intent. While the NBA, because it pre-dated the relevant jurisdictional statutes and doctrines, may not neatly fit into the complete pre-emption analysis of modern statutes, this court finds that there is sufficient evidence in decisional law and the language of the NBA from which to conclude that Congress intended for national banks to be held to national standards, and not to be held liable under state law on claims alleging usury. Therefore, finding no reason to depart from its earlier analysis, the court again concludes that usurious interest claims are completely pre-empted under the NBA.

In the two cases in which this court was previously presented with an argument of complete pre-emption under the NBA, the court determined that there was no federal jurisdiction because the plaintiffs had not alleged claims of usurious interest, which is the type of claim that is completely preempted under the NBA. *See Monday*, 1997 WL 114874 at *10; *Mason*, 40 F.Supp.2d at 1345. In this case, the Plaintiffs have pleaded a claim for usurious interest. *See* Complaint, Count Four; Brief in Support of Motion to Remand, page 8. Accordingly, the Plaintiffs have brought a claim which is completely preempted by the NBA, creating federal question jurisdiction in this court.

The court recognizes that, while it has found evidence of Congressional intent to completely pre-empt state law usurious interest claims under the NBA, there is significant disagreement among courts over the presence of Congressional intent to completely pre-empt state law claims under the NBA. *See Jones*, 115 F.Supp.2d at 1357. The court further notes that the *BLAB T.V.* decision came before the Eleventh Circuit as a question certified for interlocutory appeal by the district court. *BLAB T.V.*, 182 F.3d at 854.

This court is willing to certify the issue of complete pre-emption in this case for interlocutory appeal, if any of the parties indicate their desire for the court to do so by filing a written request by December 29, 2000.

V. CONCLUSION

For the reasons discussed above, this court has federal jurisdiction by virtue of the presence of a federal question in this case. Accordingly, the Motion to Remand (Doc. # 7) is due to be and is ORDERED DENIED.

ORDER

For good cause shown, it is hereby ORDERED that the Memorandum Opinion and Order of this court entered on December 14, 2000 is AMENDED to add the following paragraph:

> This order involves the issue of whether the court has jurisdiction to proceed with this case. Therefore, pursuant to 28 U.S.C. § 1292(b), the court certifies that it is of the opinion that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. It is, therefore, FURTHER ORDERED that if the Plaintiffs make application for an appeal within ten (10) days after the entry of this order, pursuant to 28 U.S.C. § 1292(b), these proceedings are STAYED pending a determination of the application by the Court of Appeals and, if the appeal is permitted, final determination of the appeal by the Court of Appeals.

The Clerk is DIRECTED to serve copies of this Order by facsimile.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed May 29, 2002]

No. 01-11863-JJ

MARIE ANDERSON, ALVESTER BRAFORT, *et al.*,
Plaintiffs-Apellants,

versus

H&R BLOCK, INC., BENEFICIAL NATIONAL BANK, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S)
FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, _____ F.2d _____).

Before: TJOFLAT, BARKETT and WILSON, *Circuit Judges*.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX D

UNITED STATES CODE ANNOTATED

TITLE 12. BANKS AND BANKING

CHAPTER 2—NATIONAL BANKS

SUBCHAPTER IV—REGULATION OF THE BANKING BUSINESS; POWERS AND DUTIES OF NATIONAL BANKS

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§ 85. Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency,

province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

APPENDIX E

UNITED STATES CODE ANNOTATED

TITLE 12. BANKS AND BANKING

CHAPTER 2—NATIONAL BANKS

SUBCHAPTER IV—REGULATION OF THE BANKING BUSINESS; POWERS AND DUTIES OF NATIONAL BANKS

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§ 86. Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred.

APPENDIX F

UNITED STATES CODE ANNOTATED

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 85—DISTRICT COURTS; JURISDICTION

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§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

APPENDIX G

UNITED STATES CODE ANNOTATED

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

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§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Jun. 17, 2002]

No. 01-11863-JJ

MARIE ANDERSON, ALVESTER BRAFORT, *et al.*,
Plaintiffs-Appellants,

versus

H&R BLOCK, INC., BENEFICIAL NATIONAL BANK, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama

ORDER:

( ) The motion of Appellees', Beneficial National Bank and Beneficial Tax Masters, Inc., for (X) stay and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The Motion of Appellees' Beneficial National Bank and Beneficial Tax Masters, Inc., for (X) stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including August 27, 2002, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The

Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 01-11863J

MARIE ANDERSON *et al.*,
Plaintiffs-Appellants,

v.

H&R BLOCK, INC.; BENEFICIAL NATIONAL BANK; AND BENEFICIAL TAX MASTERS, INC.
Defendants-Appellees.

On Appeal from an Order ff the United States District Court for the Middle District of Alabama No. 00-A-1457-N
The Honorable W. Harold Albritton

BRIEF *AMICUS CURIAE* OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY IN SUPPORT OF DEFENDANT-APPELLEE BENEFICIAL NATIONAL BANK REQUESTING AFFIRMANCE OF THE DISTRICT COURT RULING

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June 2001

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The amicus curiae adopts the list of 48 interested persons found in Brief of Appellants-Plaintiffs (pp. i-iii) and makes the following additions thereto:

Office of the Comptroller of the Currency

Julie L. Williams
Daniel P. Stipano
L. Robert Griffin
Ernest Clifford Barrett, III

CERTIFICATE OF TYPE SIZE AND STYLE

The size and style of type used in this Brief is Times New Roman, 12 point.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICUS CURIAE	1
ISSUE PRESENTED	2
SUMMARY OF ARGUMENT	2
INTRODUCTION	3
ARGUMENT	6
Congressional Intent To Provide An Exclusive Forum In The Federal Courts For Usury Actions Against National Banks Is Evident From The Plain Language Of The Statute, Is Consistent With Congress's Desire For Uniform Standards For National Banks, And Has Been Widely Recognized In The Courts	6
I. The Plain Language Of The Statute	6
II. Uniform National Bank Standards	8
III. Applicable Court Precedents	9
CONCLUSION	12
CERTIFICATE OF COMPLIANCE	14
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

FEDERAL CASES	Page
Ament v. PNC Nat'l Bank, 825 F.Supp.1243 (W.D. Pa.' 1992)	11
Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968)	10, 11
BLAB T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc., 182 F.3d 851 (11th Cir. 1999)	3, 11
Barnet v. Muncie Nat'l Bank, 98 U.S. 555 (1879)	9, 12
Davis v. Elmira Savings Bank, 161 U.S. 275 (1896)	8
Easton v. Iowa, 188 U.S. 220 (1903)	8
Evans v. Nat'l Bank of Savannah, 251 U.S. 108 (1919)	9, 12
Farmers' and Mechanics' Nat'l Bank v. Dearing, 91 U.S. 29 (1875)	*passim*
First Nat 7 Bank in Mena v. Nowlin, 509 F.2d 872 (8th Cir.1975)	10
First Nat 'l Bank of San Jose v. California, 262 U.S. 366 (1923)	9
First Nat 'l Bank v. Smith, 610 F.2d 1258 (5th Cir. 1980)	1
Fortenberry v. Southtrust Bank of Alabama, N.A., 1996 U.S.Dist. LEXIS 21685 (N.D. Ala. 1996)	11
Goehl v. Mellon Bank (DE), 825 F.Supp. 1239 (E.D. Pa. 1993)	11
Independent Bankers Assn of America v. Heimann, 613 F.2d 1164, (D.C. Cir.1979), *cert. denied*, 449 U.S. 823 (1980)	1
Jones v. Bank Boston, N.A., 115 F.Supp.2d 1350 (S.D. Ala. 2000)	11

TABLE OF AUTHORITIES

	Page
M. Nahas & Co. v. First Nat'l Bank of Hot Springs, 930 F2d 608 (8th Cir. 1991)	10
Marquette Nat'l Bank v. First of Omaha Corp., 439 U.S. 299 (1978)	6
McCollum v. Hamilton Nat'l Bank of Chattanooga, 303 U.S. 245 (1938)	7
Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987)	3
Nelson v. Citibank (South Dakota), N.A., 794 F.Supp. 312 (D. Minn. 1992)	11
Spellman v. Meridian Bank (Delaware), 1995 WL 764548 (3d Cir. 1995)	5
Tiffany v. Nat'l Bank of Missouri, 85 U.S. 409 (1874)	5, 6
Watson v. First Union Nat'l Bank of South Carolina, 837 F.Supp. 146 (D.S.C. 1993)	11
STATE CASES	
Florence R.R. & Improvement Co. v. Chase Nat'l Bank, 17 So.720(Ala.1894)	9
FEDERAL STATUTES	
12 U.S.C. § 85	*passim*
12 U.S.C. § 86	*passim*
28 U.S.C. § 1331	3
28 U.S.C. § 1441	2
28 U.S.C. § 1441(a)	3
National Bank Act, 12 U.S.C. §§ 1 *et seq.*,	1
National Bank Act of 1864, § 30, 13 Stat. 108 (1864)	*passim*
National Currency Act of 1863, § 46,112 Stat. 678-679 (1863)	5

TABLE OF AUTHORITIES

MISCELLANEOUS	Page
Cong. Globe, 38th Cong., 1st Sess. 1451 (1864)...	5
Hackley, Howard H. *Our Baffling Banking System*—Part I, 52 Va.L.Rev. 565 (1966)	4,6
Hammond, Bray. *Sovereignty and an Empty Purse: Banks and Politics in the Civil War* 290(1970).....	4
Robertson, Ross M. *The Comptroller and Bank Supervision* 36 (1995 ed)	4

INTEREST OF THE AMICUS CURIAE

The Office of the Comptroller of the Currency ("OCC") is a bureau within the Department of Treasury charged with the administration of the National Bank Act, 12 U.S.C. §§ 1 *et seq.*, and the supervision of national banks. The OCC, whose chief officer is the Comptroller of the Currency, has broad authority over the chartering, supervision, and regulation of almost every aspect of the affairs of banks organized under the National Bank Act, including the power to determine whether a bank's activities are permissible under national banking laws. *See Independent Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164, 1168 (D.C. Cir.1979), *cert. denied*, 449 U.S. 823 (1980); *First Nat'l Bank v. Smith*, 610 F.2d 1258, 1264 (5th Cir.1980). Appellee Beneficial National Bank USA, New Castle, Delaware, is a national bank chartered and supervised by the OCC.

This case turns on the interpretation of the usury provisions of the National Bank Act, 12 U.S.C. §§ 85 and 86. As the district court noted, a long line of precedent supports the conclusion that those provisions establish an exclusively federal remedy for allegations that a national bank has charged excessive rates of interest, thereby foreclosing any state law cause of action for usury. The OCC believes that the district court correctly held, on that basis, that the federal remedy has occupied the field of usury claims against national banks, supporting removal to federal court under the doctrine of "complete preemption." Accordingly, the OCC is vitally interested in this case as the federal agency charged with interpreting the National Bank Act and with protecting the safety and soundness of the national banking system. Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the OCC files this brief *amicus curiae* in support of defendant-appellee Beneficial National Bank urging affirmance of the decision below.

ISSUE PRESENTED

Whether the doctrine of "complete preemption" displaces a state cause of action alleging violations of Alabama usury laws by a national bank, thereby authorizing removal of the case to federal court under 28 U.S.C. § 1441.

SUMMARY OF ARGUMENT

When enacting the National Bank Act in 1864, Congress tried to assure that the new national banks would benefit from a national standard governing the interest rates that the new banks could charge on their loans. This standard, now codified in 12 U.S.C. § 85, allows a national bank to "charge on any loan or discount made . . . interest at the rate allowed by the laws of the State, Territory, or District where the bank is located . . .," and it is complemented by a remedy, found in 12 U.S.C. § 86, for any violations. Under this remedy, the borrower must institute "an action in the nature of an action of debt" to recover the amount specified in the statute, and must do so "within two years from the time the usurious transaction occurred." Subsequent Supreme Court decisions, mindful of the Congressional concern to protect the new banking system from unfriendly state legislation as well as the system's need for uniformity, declared that these two sections "cover the entire subject" and are "exclusive."

As the Eighth Circuit has held, any usury claim against a national bank is federal in nature, and this, together with the exclusive federal remedy in § 86, effects "complete preemption" of state causes of action against a national bank for violations of state usury law. Thus, such actions should be removed to federal court. Explicit Congressional authorization for removal is unnecessary because the statutes themselves, as interpreted in early Supreme Court decisions, reflect legislative intent to create an exclusive federal forum.

INTRODUCTION

I. Complete Preemption

Title 28 U.S.C. § 1441 (a) authorizes removal to federal court of state court actions that "arise under the laws of the United States." whether the federal court has the necessary federal question jurisdiction to hear the case after removal depends on whether the "action aris[es] under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331. In making this determination, courts apply the well-pleaded complaint rule, which generally calls for the court to look to the face of the complaint, rather than to any defenses (such as "traditional" or "ordinary" preemption) asserted by the defendant, to determine whether the case presents a federal question supporting removal. There is, however, an exception to the well-pleaded complaint rule known as the "complete preemption" doctrine. This exception recognizes that, in certain cases, "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987); *BLAB T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc.* ,182 F.3d 851, 854 (11th Cir.1999). In such cases, purported state law claims are converted into claims stating a federal question, and therefore removal is proper. Here, the OCC believes the National Bank Act's usury provisions, 12 U.S.C. §§ 85-86, dictate application of the "complete preemption" doctrine.

II. National Bank Usury Law

The origin of national bank usury law dates back to the mid-19th Century, and reflects Congress's desire to have a uniform national currency and banking system. At the outbreak of the Civil. War, circulating currency in the United States consisted of notes issued by state chartered banks. The uncertain nature of the security backing these notes and the

need for a uniform currency to pay Union troops culminated in the passage of the National Currency Act of 1863,12 Stat. 665. This act provided for a national currency to be circulated by a new system of privately owned banks chartered by a new Treasury Department bureau headed by the Comptroller of the Currency. The following year, the National Currency Act was replaced by the National Bank Act of 1864,13 Stat 99, which carried over many provisions of the 1863 act and added others. *Howard H. Hackley, Our Baffling Banking System—Part I*, 52 Va. L. Rev. 565, 569-571(1966); Bray Hammond, *Sovereignty and an Empty Purse: Banks and Politics in the Civil War* 290-297 (1970); Ross M. Robertson, *The Comptroller and Bank Supervision* 36-54 (1995 ed.). The legislative debate reflected a Congressional assessment that the National Bank Act was essential to the nation's survival, and that threats to the new banking system from existing state banks should be reduced or eliminated. During the debates, Congressman Hooper remarked,

> I believe the existence of the nation is at stake upon this issue; that the present necessity requires the use of every legitimate means to sustain the credit of the Government; . . . I appeal to the members of the House, and I ask them if they can excuse themselves to their constituents and to posterity if they sacrifice the great interests that are now at stake to the comparatively petty interest of local banking.

Cong. Globe, 38th Cong., Ist Sess. 1451 (1864). Reviewing this history, one appellate judge observed, "[I]t is clear that the National Bank Act was a significant exercise of Congressional authority, intended by Congress to alter federal-state relations." *Spellman v. Meridian Bank (Delaware)*, 1995 WL 764548 at *22 (3d Cir.1995)(dissent by Scirica, J.)

An important feature of both the National Currency Act and the National Bank Act was the rate of interest that a national bank may charge on its loans. *See* National Currency

Act, § 46, 12 Stat. 665, 678-679 (1863), and National Bank Act, § 30,13 Stat. 99,108 (1864). Loans typically constitute the predominant asset on a bank's balance sheet, so interest is a principal component of virtually every bank's income. Moreover, as Rep. Hooper's comment suggests, Congress in 1863-1864 was intensely aware of the vigorous competition from state banks, many of which opposed the creation of the parallel national banking system. For these reasons, Congress enacted in section 30 of the National Bank Act *both* a national standard for determining the interest that the new banks could charge *and* an exclusive remedy for borrowers charged more than the allowed rate. 13 Stat.108. Section 30, later divided into two sections in amended form for codification as 12 U.S.C. §§ 85-86, "was considered indispensable to protect them against possible unfriendly state legislation." *Tiffany v. Nat'l Bank of Missouri*, 85 U.S. 409, 412 (1874). Not only did the National Bank Act ensure a level playing field with state banks, but it also deliberately "gives advantages to national banks over their state competitors." *Id.* at 413; *Marguette Nat'l Bank v. First of Omaha Corp.*, 439 U.S. 299, 314 (1978)(national bank can charge an out-of-state borrower interest allowed by the bank's home state, even if such rate is higher than allowed by the state where borrower resides); Hackley, 52 Va. L. Rev. at 585-586. Thus, the remedy portion of § 30, now codified at 12 U.S.C. § 86, is fully consistent with Congress's desire for national uniformity and with national banks' favored status.

ARGUMENT

Congressional Intent to Provide an Exclusive Forum in the Federal Courts for Usury Actions against National Banks is Evident from the Plain Language of the Statute, is Consistent with Congress's Desire for Uniform Standards for National Banks, and has been Widely Recognized in the Courts.

I. The Plain Language Of The Statute

Congress's intent to establish an exclusive forum in the federal courts for usury actions against national banks is evident from the plain language of 12 U.S.C. §§ 85 and 86. Under 12 U.S.C. § 85, a national bank may charge interest "at the rate allowed by the laws of the State. . . where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank . . . ." Under 12 U.S.C. § 86, knowingly charging "a rate of interest greater than is allowed by section 85 . . . shall be deemed a forfeiture of the entire interest. . . ." Where excessive interest has been paid, "the person by whom it has been paid . . . may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid . . . *Provided*, That such action is commenced within two years from the time the usurious transaction occurred."

Twelve U.S.C. §§ 85 and 86 are inextricably linked. Just as 12 U.S.C. § 85 establishes a national standard for determining permissible rates of interest on a national bank's loans, 12 U.S.C. § 86 provides the exclusive remedy for a borrower alleging that the interest exceeds what is permitted by § 85. Moreover, both of these sections were derived from § 30 of the National Bank Act. Thus, §§ 85 and 86, "examined by their own light, seem to us too clear to admit of doubt as to anything to which they relate. They form a system of regulations. All the parts are in harmony with each other, and cover the entire subject. *Farmers and Mechanics Nat 'l Bank v. Dearing*, 91 U.S. 29, 32 (1875). There, the Supreme Court agreed with the bank that the penalty for usury was "forfeiture of the entire interest" as prescribed in § 86, not declaring the note "void" as required by New York law. This was a reasonable conclusion, since it seems highly unlikely that Congress would enact a law that sets a uniform standard

for rates and in the same section of that law provide a uniform remedy for violations, while simultaneously contemplating the adjudication of state law remedies in a non-federal forum. Rather, section 30 of the National Bank Act created a new and exclusive federal cause of action, and "the power to supplement it by state legislation is conferred neither expressly nor by implication." 91 U.S. at 35. See also *McCollum v. Hamilton Nat'l Bank of Chattanooga*, 303 U.S. 245, 247-249 (1938) ("Punishment for usury does not depend upon payment of the borrower's debt" but "shall be paid according to the terms of the statute" without consideration of aggravating circumstances or equitable considerations).

II. Uniform National Bank Standards

Congressional intent to provide an exclusive forum in the federal courts for usury actions against national banks is consistent with Congress's overall intent to have uniform standards for national banks. The need for a uniform remedy for usury violations has its origin in the unique purposes for which the national banking system was created. Through the national charter, Congress has established a banking system intended to be both nationwide in scope and uniform in character. As stated in *Easton v. Iowa*, 188 U.S. 220, 229 (1903), federal legislation affecting national banks "has in view the erection of a system extending throughout the country, and independent, so far as the powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states." *See also Davis v. Elmira Say. Bank*, 161 U.S. 275, 283 (1896) ("This freedom from State control over a national bank's powers protects national banks from conflicting local laws unrelated to the purpose of providing the uniform, nationwide banking system that Congress intended."); *Farmers' and Mechanics' Nat'l Bank*, 91 U.S. at 33-34 ("The national banks organized under the [National Bank] Act are instruments designed to be used

to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. . . . Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in anywise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is an abuse, because it is the usurpation of power which a single State cannot give.'") (internal citation omitted); *First Nat'l Bank of San Jose v. California*, 262 U.S. 366, 369 (1923).

The uniformity theme is echoed in § 30 which, as enacted in 1864, embodied both a standard for determining the interest rate and a detailed procedure for an overcharged borrower to obtain redress. In this way, § 30 "establishes a system of general regulations" for determining "whether transactions by [a national bank] are usurious and the consequent penalties therefore" *Evans v. Nat 1 Bank of Savannah*, 251 U.S.108, 109, 111(1919).

III. Applicable Court Precedents

Numerous courts, including the Supreme Court, have recognized that federal courts provide an exclusive forum for usury actions against national banks. Thus, from the beginning, the Supreme Court has recognized that the cause of action created by § 86 forecloses any parallel state usury cause of action against a national bank. *Barnet v. Muncie Nat'l Bank*, 98 U.S. 555, 558 (1879) ("Where a statute creates a new right or offense, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive"). For more than a century, the Alabama Supreme Court has recognized the exclusive federal penalty in § 86. *Florence R.R. & Improvement Co. v. Chase Nat'l Bank*, 17 So. 720, 721 (Ala. 1894). Because the same legislation that brought national banks into existence precluded application to them of state usury laws except to ascertain the permissible interest

rate, no state law cause of action for usury has ever existed against national banks. Accordingly, no subject matter area could be more "completely preempted" by federal law within the meaning of *Metropolitan Life, supra*.

More recently, the federal appellate courts have affirmed that state law has no role in setting the penalty for usury committed by a national bank. In *First Nat'l Bank in Mena v. Nowlin*, 509 F.2d 872 (8th Cir. 1975), the Eighth Circuit rejected the argument that national banks should be subject to state rather than federal penalties. Citing *Evans v. Nat'l Bank of Savannah, supra*, the court said:

> To hold otherwise in the instant case would jeopardize the national banking system by allowing the states to set penalties for violations of federal law. That is patently contrary to the congressional policy of assuring national banks parity with state banks and most favored state lenders. Furthermore, since Congress has provided a penalty for usury, that action preempts the field and leaves no room for varying state penalties.

509 F.2d at 881.

In 1991, the Eighth Circuit took this reasoning one step further in *M. Nahas & Co. v. First Nat'l Bank of Hot Springs*, 930 F.2d 608 (8th Cir.1991). There, the court concluded that the exclusive federal remedy, created by Congress over 100 years.ago to prevent the application of overly punitive state law usury penalties against national banks, is squarely within the complete preemption doctrine of *Avco Corp. v. Aero Lode No. 735*, 390 U.S. 557 (1968). Thus, while the complaint in that case, alleging a violation of Arkansas usury laws with the remedy to be found in the Arkansas Constitution, was couched wholly in state law terms, "it was necessarily federal in nature and properly removable." 930 F.2d at 612.

Subsequent case law on the applicability of the complete preemption doctrine to usury claims against national banks is in accord. *Fortenberry v. Southtrust Bank of Alabama*, N.A., 1996 U.S. Dist. LEXIS 21685 (N.D. Ala. 1996) (removal is proper because plaintiff's action is federal in nature); *Goehl v. Mellon Bank (DE)*, 825 F. Supp.1239,1243 (E.D. Pa. 1993) ("sections 85 and 86 of the NBA subsume the interests for which Plaintiffs seek vindication under state law. . . . [and] there is a clear indication of Congressional intent to permit removal" in such cases); *Watson v. First Union Nat'l Bank of South Carolina*, 837 F. Supp.146, 148-150 (D.S.C.1993) (vast majority of courts have concluded that complete preemption applies even when a complaint alleging national bank usury is based solely on state statutes setting the interest rate and the remedy for a usurious loan); *Ament v. PNC Nat'l Bank*, 825 F. Supp.1243, 1250 (W.D. Pa. 1992) (complete preemption applies because section 86 vindicates the same interest that plaintiffs seek to vindicate by their state law claims); *Nelson v. Citibank (South Dakota), N.A.*, 794 F. Supp. 312, 316 (D. Minn. 1992) (removal is proper because usury claims, though grounded in Minnesota law, are necessarily federal in character).

Despite widespread agreement on the propriety of removing state causes of action against a national bank for usury, several courts have not permitted removal. One decision, *Jones v. Bank Boston, N.A.*,115 F. Supp. 2d 1350 (S.D. Ala. 2000), concluded that insufficient evidence of Congressional intent to allow removal can be found in the National Bank Act, and therefore the complete preemption doctrine, as explained in *Avco Core., supra, and BLAB T.V. of Mobile, Inc., supra*, does not apply. The court failed to recognize that the Supreme Court decided this very issue in *Farmers' and Mechanics' Nat'l Bank*, in *Barnet* and in *Evans*. Under those decisions, to which the Jones court either gave only cursory attention (*Farmers' and Mechanics'*) or failed to mention at

all (*Barnet, Evans*),115 F. Supp. 2d at 1357, the provision in § 30 of the National Bank Act of a framework of substantive law, together with an exclusive remedy "in an action in the nature of an action of debt" within two years of the usurious transaction, answers the question whether Congress intended to displace a state cause of action alleging state usury law violations by a national bank.

CONCLUSION

From the above, it is evident that the only viable means of recovery against a national bank for usurious interest is a federal cause of action that should appear on the face of a wellpleaded complaint. For purposes of the instant case, the law has been settled for over a century, even in the Alabama Supreme Court, so there are no issues for the state court to resolve. Where Congress clearly wished to displace state law by creating an exclusive federal remedy and stressed the importance of uniformity in the fledgling national banking system, a finding of complete preemption is appropriate. The lower court, by giving deserved weight to the historical context, the scheme set out in section 30 of the National Bank Act of 1864 and the decisional law interpreting the statutory language, properly applied the doctrine here by refusing to remand the case to state court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has a word count of less than 7,000 words, and complies with the length requirements specified in Fed. R. App. P. 32(a)(7).

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APPENDIX J

UNITED STATES DISTRICT COURT MIDDLE
DISTRICT OF LOUISIANA

[Filed Jan 13, 1998]

DOUGLAS GALLAGHER, FERMIN TULLIER, PATRICK JUGE,
BONNIE GILBERT, HARRY BATISTE, JR, and JULIE DAVENPORT,

v.

H&R BLOCK EASTERN TAX SERVICES, INC., *et al*

RULING ON MOTION TO REMAND

This matter is before the court on a motion to remand by plaintiffs, Douglas Gallager, Fermin Tuller, Patrick Juge, Beonnie Gilbert, Harry Batiste, Jr, and Julie Davenport. Defendants, Eastern Tax Services, Inc., H&R Block, Inc., Block Financial Corporation, Danette Dagle, Paulette Landry, Lois Falcon, and Defendants A through Z (collectively "Block"), oppose the motion. Removal jurisdiction is allegedly based on federal question subject matter jurisdiction, 8 U.S.C. §1331.

Background

According to the memoranda and documents submitted by the parties in support therof, on July 8, 1997, plaintiffs filed a class action petition in the 18th Judicial District Court, Parish of Iberville, State of Louisiana, seeking to recover monetary compensation for damages and for attorney fees, for alleged financial harm by Block in a scheme to systematically target and deceive lower income, unsophisticated taxpayers out of "exorbitant" interest and fees. Plaintiffs allege that Block induced plaintiffs and other Louisiana residents to 1) pay a fee to Block to secure their tax refunds supposedly more

quickly than available elsewhere; and 2) pay outrageous finance charge for short term, fully secured loans from Block's lending banks.

The petition alleges that defendants are liable on the following count:1) fraudulent misrepresentation; 2) fraudulent concealment; 3) dual agency; and 4) breach of fiduciary duty.

Oh July 25, 1997, defendants filed a notice of removal.

Plaintiffs filed a motion to remand on August 15, 1997, on the grounds that 1) the claims by plaintiffs do not arise under federal law; and 2) if applicable, preemption would only be a defense to state law claims, and would not be grcunds for removal. Plaintiffs also request that the court assess attorney's fees against Block.

Defendants oppose the motion on the grounds that 1) the are substantial disputed questions of federal law in this case which are central to the claims by plaintiffs for recovery; and 2) plaintiffs have artfully pleaded in state law terms a completely preempted federal cause of action.

Arguments

Plaintiff argue that the state court petition alleges no federal claims, only violations of Louisiana law, prohibiting fraud, suppression, breach of fiduciary duty and dual agency. Plaintiffs argue that the court should not accept Block's distortion of the state law claims into a claim under the National Bank Act, 12 U.S.C. 21 *et seq.* because plaintiffs do not sue Block under the Act, nor cold they, because the *Act* regulates only the business of banking, and Block is not a bank. Plaintiff argue that Louisiana's interest in prohibiting Block from deceiving Louisiana residents into exorbitant interest obligations does not impact the purpose of the Act or any other federal law.

Plaintiffs also argue that Block's supposed preemption defense cannot create federal jurisdiction, because the National Bank Act does not apply for preemption purposes when no claims against a bank have been asserted.

Defendants argue that the issue of the agency or broker status of defendants in relation to notional banks is tantamount to their status as alleged "branch offices" "branch agencies", or "additional offices" of national banks conducting banking businesses which is a matter of federal law; thus ; defendants argue, the success of the allegations depends on determination of whether one or more of the Block defendants were "agents" or "brokers" of these national banks in allowing the transactions to occur. Defendants argue that plaintiffs all but name the national bank as parties by alleging that the Block defendants concealed the fact the they were actually creditors on the loans.

Defendants also argue that, under the complete preemption component of the "artful pleading" doctrine, plaintiffs rest their case against defendants on the deceptive collection of excessive interest from plaintiffs pursuant to loans actually made by one or more national banks, in violation of the interest rates authorized by the National Bank Act. Defendants argue that, if plaintiffs are willing to argue that Block is the legal surrogate of national bank lenders in the lending program, it follows that the preemptive effect of the laws that govern the national banks be applied to all aspects of the litigation, from the standpoint of liability, remedy and jurisdiction.

Law and Discussion

To support removal, defendant bears the burden of establishing federal jurisdiction over the state court suit.[1] Removal under section 144(b), the basis of removal here, is

[1] *Carpenter v. Wichata Falls Independent School District*, 44 F.3d 362, 365 (5th Cir. 1995).

appropriate only for those claims with the federal question jurisdiction of the district courts, that is, for those actions "arising under the Constitution, Laws, or treaties of the United States." [2]

A case "arises under" federal law when a "right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of plaintiff's cause of action.[3] If, however, the state law created the cause of action, the court must determine whether plaintiff's demand "necessarily depends on resolution of a substantial question of federal law.[4]

Generally, a suit may not be removed from state court to federal court on the basis of a federal defense including the defense of preemption; however, under the "complete preemption doctrine", once an area of state law has been completely preempted, any claim based on the preempted state law is considered a federal claim and therefore arises under federal law.[5]

When plaintiff challenges the propriety of defendant's removal, defendant carries the burden of showing the necessary facts to support the court's exercise or removal jurisdiction.[6] Any doubts about the propriety of removal are construed in favor of remand.[7] The removal statute should be

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[2] 28 U.S.C. § 1331.

[3] *Franchise Tax Bd. v. Const. Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983).

[4] *Id.*

[5] *Caterpillar Inc. v. Williams,* 482 U.S. 386, 107 S.Ct 2425, 96 L.Ed 2d 318 (1987).

[6] *See Jernigan v. Ashland Oil, Inc.* 989 F.2d 812, 815 (5th Cir. 1993); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 56 S.Ct. 780, 785, 80 L.Ed. 1135 (1936).

[7] *Butler v. Polk*, 592 F.2d 1293, 1296 (5th Cir. 1979).

strictly construed against removal and all doubt should be resolved in favor of remand.[8]

The National Bank Act, 12 U.S.C. § 21 *et seq.*, governs the operations of national banking associations.[9] The background begins in 1863 and 1864, when the Civil War Congress enacted and then reenacted the National Bank Act, which launched the modem national banking system by providing for federal chartering of private commercial banks and empowering the newly created national banks to issue and accept a uniform national currency.[10] Authorizing national banks to "carry on the business of banking," the National Bank Act provides that such banks shall have power—

> To exercise . . . all such incidental powers as shall be necessary to carry on the business of banking: by discounting and negotiation promissory notes drafts, bills of exchange, and other evidences of debt; by receiving deposit; by buying and selling exchange , coin, and buttons; by loaning money on personal security; and by obtaining , issuing, and circulating notes . . . The business of dealing in securities and stock by the [bank] shall be limited to purchasing and selling such securities and stock with out recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the [bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers,

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[8] *Shamrock Oil and Gas Corp. v. Sheets*, 313 U.S. 100, 61 S.Ct. 868 85 L.Ed. 1214 (1941).

[9] *Jackson v. First Nat. Bank of Valdosta*, 349 F.2d 71 (5th Cir. 1965).

[10] *U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993), *citing* Act of Feb. 25, 1863, ch. 58, 12 Stat. 665; Act of June 3, 1864, ch. 106, 13 Stat. 99; E. Symons, Jr., & J. White, Banking Law 22-25 (3d ed. 1991); and 12 U.S.C. § 38.

and in no case for its own account, and the [banks]shall not underwrite any issue of securities or stock . . .," 12 U.S.C. § 24 Seventh (1988 ed. And Supp. V)." [11]

The National Bank Act, U.S.C. § 85, permits a national bank to charge "interest at the rate allowed by the laws of the State . . . where the bank is located . . . and no more." Further, 12 U.S.C. § 86 provides the penalty for usury against a national banks that "tak[es], receiv[es], or charg[es] a rate of interest greater than is allowed by Section 85." [12] Suits under sections 85 and 86 of the National Bank Act, and the predecessors of those sections, are federal question cases.[13]

Plaintiffs allege that the "Rapid Refund" program is a loan program administered by defendants *in association with banking institutions*. Plaintiffs allege that defendants solicted from their clients, *on behalf of various banks*, loans which were collateralized with the clients, on behalf of various banks, loans which were collateralized with the expected refund. Under the arrangement *with the banks which issue the loans*, plaintiffs allege, defendants *received a kickback from the banks* for each refund anticipation loan entered into by its clients. Plaintiffs allege that the true the relationship between defendants and the lenders was that *of broker or agent for the lender*. It is clear that plaintiffs have attempted to gain the liability and class action benefits of indentifying defendants with the banks but none of the jurisdictional consequences of the allegations.

The state court petition clearly alleges that the loans were made by the national banks through their agent, H&R black.

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[11] NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 115 S.Ct. 810, 130 L.Ed.2d 740 (1195).

[12] 12 U.S.C. §§ 85-86.

[13] *Fourehem, Inc. v. Louisiana National Leashing Corp*, 723 F.2d 376 (Cir 1984).

The state court petition clearly attacks the validity of the loans made by the national banks. These allegations are sufficient to implicate the provisions of sections 85 and 86 of the national banks Act, even though the banks themselves are not now joined as parties to the action.

Although the National Bank Act regulates only the business of banking and named defendants are not banking associations, defendants have provided persuasive support for their claim which would place this matter under the National Bank Act. Plaintiffs may not escape federal jurisdiction by artfully omitting parties to the transactions that are the subject of this lawsuit.

Accordingly, for the reason assigned the motion by plaintiffs to remand is hereby DENIED.

/s/ John V. Parker
JOHN V. PARKER, Chief Judge
MIDDLE DISTRICT OF LOUISIANA

Supreme Court U.S.
FILED
DEC 23 2002
OFFICE OF THE CLERK

Nos. 02-306 & 02-312

IN THE

Supreme Court of the United States

BENEFICIAL NATIONAL BANK and
BENEFICIAL TAX MASTERS, INC.,

Petitioners,

-and-

H & R BLOCK, INC.,

Petitioner,

v.

MARIE ANDERSON, *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit of Appeals was correct in refusing to expand the extremely limited doctrine of complete or field preemption to claims where the National Bank Act may provide a defense to a state law claim, and the law is that a case in which the plaintiff asserts only state law claims may not be removed to federal court based on a federal defense — even the defense of ordinary preemption. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 399 (1987) ("Congress has long since decided that federal defenses do not provide a basis for removal.").

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	vii
Objection to Jurisdiction	1
Statement of the Case	1
Statutory Provisions Involved	2
Reasons for Denying the Petition	2
A. The Burden Is On Defendants To Show That State Law Causes Of Action Are Removable.	5
B. The Parameters Of The National Bank Act Fall Far Short Of What Is Necessary For "Complete" Or "Field" Preemption.	6
1. Difference Between Ordinary And Complete Preemption.	7
2. There Is No Evidence Of Any Intent To Displace State Causes Of Action By The National Banking Act.	8
Conclusion	20

TABLE OF CITED AUTHORITIES

Cases	Page
Avco Corp. v. Aero Lodge No. 735, International Assoc. of Machinists & Aerospace Workers, 390 U.S. 557, 88 S. Ct. 1235, 20 L. Ed. 2d 126 (1968)	6, 12
BLAB TV of Mobile, Inc. v. Comcast Cable Comm., Inc., 182 F.3d 851 (11th Cir. 1999)	7, 19
Burns v. Windsor Ins. Co., 31 F.2d 1092 (11th Cir. 1994)	5
Butero v. Royal Maccabees Life Ins. Co., 174 F.3d 1207 (11th Cir. 1999)	12
Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987)	*passim*
First National Bank of Aberdeen v. Aberdeen National Bank, 627 F.2d 843 (8th Cir. 1980)	4, 9
Florence R. R. & Improvement Co. v. Chase National Bank, 17 So. 720 (Ala. 1895)	8
Franchise Tax Bd of Cal. v. Construction Laborers Vacation Trust, 463 U.S. 1, 103 S.Ct. 2841, 77 L. Ed. 2d 420 (1983)	9, 10

Cited Authorities

	Page
Gully v. First National Bank, 627 F.2d 843 (8th Cir. 1980)	3
Hare, et al. v. H & R Block and Beneficial, Case No.:CV-02-C-1848-W	3, 4
Helms v. First Alabama Bank, N.A., 386 So. 2d 450 (Ala. 1980)	8
Jones v. BancBoston, N.A., 115 F. Supp.2d 1350 (S.D. Ala. 2000)	12, 13, 14
Kemp v. International Bus. Mach. Corp., 109 F.3d 708 (11th Cir. 1997)	19
Krispin v. May Dept. Stores Co., 218 F.3d 919 (8th Cir. 2000)	2, 4
Mayor & Alderman of City of Nashville v. Cooper, 73 U.S. 247 (1867)	18
M. Nahas & Co., Inc. v. First National Bank, 930 F.2d 608 (8th Cir. 1991)	*passim*
Mercantile Nat'l Bank at Dallas v. Longdeau, 371 U.S. 555 (1963)	9
Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987)	*passim*

Cited Authorities

	Page
Pacheco de Perez v. AT&T Co., 139 F.3d 1373 (11th Cir. 1998)	5
Rivet v. Regions Bank of Louisiana, 522 U.S. 470 (1998)	6
Smiley v. Citibank, 517 U.S. 735 (1996)	15
Smith v. GTE Corporation, 236 F.3d 1292 (11th Cir. 2001)	8
Spellman v. Meridian Bank (Delaware), 1995 WL 764548	15, 17
University of South Alabama v. American Tobacco Co., 168 F.3d 405 (11th Cir. 1999)	5
Video Trax, Inc. v. NationsBank, N.A., 33 F. Supp. 2d 1041 (S.D. Fla. 1998)	18

Cited Authorities

Page

Statutes

Ala. Code § 8-8-1 (1975) 1, 2

12 U.S.C. § 24 9

12 U.S.C. § 85 ..... *passim*

12 U.S.C. § 86 ..... *passim*

28 U.S.C. § 1331 ..... 1, 10

28 U.S.C. § 1441(b) 1

Employer Retirement Income Security Act of 1974 ..... 5, 6

Labor Management Relations Act of 1947 5

Rule

U.S. Sup. Ct. R. 10(a) 2, 3

Other Authority

Michael T. Collins, the Unhappy History of Federal Question and Removal, 71 Iowa Law Review 717 (1986) 18

TABLE OF APPENDICES

Page

Appendix A — Complaint 1a

Appendix B — In The United States District Court For The Northern District Of Alabama, Western Division Dated And Filed September 6, 2002 ..... 12a

OBJECTION TO JURISDICTION

Neither this Court, nor any other Federal court, has jurisdiction over this case because the diversity statute does not apply, and there is no claim, "arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, allowing for removal jurisdiction under 28 U.S.C. § 1441(b).

STATEMENT OF THE CASE

On or September 19, 2000, Plaintiff Marie Anderson, and twenty-five (25) other persons, filed a Complaint in the Circuit Court of Barbour County, Alabama, Clayton Division, against defendants H & R Block, Inc. ("H & R Block"), Beneficial National Bank, and Beneficial Tax Masters, Inc. (collectively referred to herein as "Beneficial"). The factual allegations of the Complaint are that Plaintiffs went to H & R Block, and were participants in the H & R Block tax refund anticipation loan program. A tax refund anticipation loan is where a taxpayer is given a short term loan from Beneficial in exchange for a pledge of an anticipated tax refund. The allegations of the Complaint are that the interest rate paid by Plaintiffs for the tax refund anticipation loans was higher than the rate disclosed to the plaintiffs, that Defendants utilized unreasonable repayment periods to calculate the interest rate, and that the amount charged for interest was in excess of that allowed by the State of Alabama. The causes of action in the Complaint are for fraud (Count I); suppression (Count II); breach of fiduciary duty (Count III); for the charging of an excessive interest rate under Ala. Code § 8-8-1 (1975) (Count IV); and for violation of the Alabama Mini-Code (Count V).

Defendants removed the case to the District Court for the Middle District of Alabama, asserting complete preemption of Plaintiffs' usury claims under the National Bank Act. On November 22, 2000, Plaintiffs timely filed a Motion to Remand. On December 14, 2000, the District Court entered an Order denying Plaintiffs' Motion to Remand the case to state court. However, the District Court certified its Order denying Plaintiff's remand motion for interlocutory appeal to the Eleventh Circuit Court of Appeals. On April 3, 2002, the Eleventh Circuit reversed the District Court's Order denying Plaintiff's Motion to Remand, and remanded the case for further proceedings consistent with its opinion. Both Beneficial and H & R Block have filed Petitions for a Writ of Certiorari with this Court.

STATUTORY PROVISIONS INVOLVED

In addition to the provisions set forth in the petitions, Ala. Code § 8-8-1 (1975) is also involved.

REASONS FOR DENYING THE PETITION

Petitioners point to the case of *M. Nahas & Co., Inc. v. First National Bank*, 930 F.2d 608 (8th Cir. 1991), as an example of a split in the circuits such that certiorari ought to be granted in this case. However, neither this opinion, nor its progeny, *Krispin v. May Dept. Stores Co.*, 218 F.3d 919 (8th Cir. 2000), compel this Court to exercise its limited jurisdiction.

Supreme Court Rule of Procedure 10 sets forth factors to be considered in granting a Petition for Writ of Certiorari. One of those is when a Circuit Court has entered a decision in conflict with the decision of another Circuit "on the same

important matter." Sup. Ct. R. 10(a). While the Eighth Circuit's opinion does completely preempt a state law usury claim, even the decisions relied upon by Defendant do not stand for the proposition than any claim that may be defensively preempted by the National Banking Act is necessarily completely preempted by the Act such that a federal court has jurisdiction.

In *M. Nahas*, the Court held that, "in areas other than usury, national banks have been denied removal even though the National Bank Act would ultimately control all or part of plaintiffs' state law action." *M. Nahas*, 930 F.2d at 611, citing *Gully v. First National Bank*, 627 F.2d 843 (8th Cir. 1980). In *M. Nahas*, the Court not only affirmed the denial of the plaintiffs' motion to remand, but also dismissed the case based on the statute of limitations, thereby ending the case. However, that would not be the situation here. First, if Defendants' arguments are carried to their logical end, the claims would first be completely preempted, and then the claim for usury would be defensively preempted. This would leave Plaintiffs' fraud, suppression, breach of fiduciary duty, and Alabama mini-code claims in federal court with no jurisdictional basis. Apparently, however, that is what Defendants seek in this case, complete field preemption of any claim that in any way touches or concerns the National Bank Act.[1] That is not what the *M. Nahas* decision stands

1. Any question that what Defendants seek to accomplish here is much broader than simply having usury claims completely preempted is answered by the activities of these same two defendants in the case of *Hare, et al. v. H & R Block and Beneficial*, Case No. CV-02-C-C-1848-W, pending in the United States District Court for the Northern District of Alabama (copies of the Complaint and Order denying Motion to Lift Stay and Remand to State Court attached

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for, and its not even the basis upon which Defendants seek to graft federal jurisdiction on in this action. In both *M. Nahas* and *Krispin*, the Court was dealing with a claim of usury, without regard or consideration as to the implications of complete or field preemption on other claims even the Eighth Circuit has not found to provide basis for removal. The alleged "split" occurred in cases with a key factual distinction. In *M. Nahas*, the case was due to be dismissed

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hereto as Appendices AI and AII). *Hare* is a tax refund anticipation loan case, with a factual scenario very similar to the case *sub judice*. However, the Complaint does not contain a cause of action for the charging of a usurious interest rate. Despite the absence of a claim that even has the National Bank Act as a defense, Defendants have successfully managed to remove the case, and keep it in Federal Court, on preemption grounds. This was done despite the Eighth Circuit opinion in *First National Bank of Aberdeen v. Aberdeen National Bank*, 627 F.2d 843 (8th Cir. 1980). In *First National Bank of Aberdeen*, the same Eighth Circuit that decided the *M. Nahas* case held, in a case wherein the defendants sought preemption based on the National Bank Act, as follows:

> These quoted passages clearly suggest that the *Gully* Court believed a defensive assertion of preemption did not give rise to federal question jurisdiction.
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> * * *
>
> But however *Avco* may be interpreted in special circumstances, we are not persuaded that the Supreme Court in *Avco* intended to invalidate the generally accepted principle that defensive assertion of federal preemption in response to a state law claim may not constitute ground for removal.

First National Bank of Aberdeen, 627 F.2d at 852.

once the doctrine of complete preemption was applied. In this case, this Court would have to go even a step further and confer federal jurisdiction over state law claims that do not even suggest a defense of ordinary preemption. Even the Eighth Circuit has decided this cannot stand. *See*, *M. Nahas*, *supra*. As such there is no true split here, and certainly not a split on "the same important matter."

A. *The Burden Is On Defendants To Show That State Law Causes Of Action Are Removable.*

It is well-established that the burden is on the shoulders of the removing party to prove that removal is proper, and to prove that the district court has jurisdiction over the removed case. *University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 411-12 (11th Cir. 1999); *see also Pacheco de Perez v. AT&T Co.*, 139 F.3d 1373 (11th Cir. 1998). Federal courts are of limited jurisdiction, and removal is not favored. A case will be remanded whenever jurisdiction is in doubt. *Burns v. Windsor Ins. Co.*, 31 F.2d 1092, 1095 (11th Cir. 1994). Moreover, a case cannot be removed on the basis of a federal defense, including the defense of preemption. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987).

The United States Supreme Court has recognized complete preemption of state law claims only in the rarest of circumstances. Those circumstances only exist where the preemptive force of the federal statute is so "extraordinary" that it "converts an ordinary common law complaint into one stating a federal claim for purposes of the well pled complaint rule." *Caterpillar, Inc.*, 482 U.S. at 393. These "extraordinary" circumstances have been recognized by the Supreme Court in only two areas: the Labor Management Relations Act of 1947 ("LMRA"); and the Employer

Retirement Income Security Act of 1974 ("ERISA"). *See Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968). (Section 301 of the LMRA "completely preempted" any state law cause of action for violation of mandatory arbitration clauses between an employer and a labor organization); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (Sections 502(a)(1)(B) and Section 502(f) of ERISA "completely preempt" employees common law contract and tort claims arising from the employer's insurer's termination of disability benefits under an ERISA Plan). *See also Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998) (Knowing that Supreme Court precedent allows only two instances of complete preemption). What Defendants wish to do now is to add a third category of complete preemption in the National Bank Act. However, even the Eighth Circuit does not go so far. *See, id.*

B. *The Parameters Of The National Bank Act Fall Far Short Of What Is Necessary For "Complete" Or "Field" Preemption.*

Any discussion of complete preemption must begin with the recognition that complete preemption is an "extraordinary" remedy that the Court has been "reluctant" to expand. It must be recognized that, even where it does apply, complete preemption operates as an extraordinary departure from the well-pleaded complaint rule, which states that a case in which the plaintiff asserts only state law claims may not be removed to Federal court based on the existence of a federal defense — even the defense of ordinary preemption. *Caterpillar, Inc.*, 482 U. S. at 393. ("Congress has long since decided that federal defenses do not provide a basis for removal.")

1. *Difference Between Ordinary And Complete Preemption.*

Ordinary preemption is a defense that may be raised in a state court, as well as in federal court. As a defense, ordinary preemption does not appear in the plaintiff's well-pleaded complaint, and thus does not give the defendant the ability to remove a case to federal court. *Caterpillar, Inc.*, 482 U.S. at 393. Unlike the defense of ordinary preemption, the doctrine of complete preemption gives a defendant the ability to remove the case to federal court. *BLAB TV of Mobile, Inc. v. Comcast Cable Comm., Inc.*, 182 F.3d 851, 854 (11th Cir. 1999).

The Supreme Court has found complete preemption under only the two federal statutes related above. In *Metropolitan Life Ins. Co. v. Taylor*, 481 U. S. 58 (1987), the Supreme Court cautiously extended the doctrine of complete preemption to ERISA § 502(a) claims. However, the doctrine of complete preemption applies only where Congress has "clearly manifested an intent" to make a particular cause of action removable to a federal court. *Metropolitan Life Ins. Co.*, 481 U. S. at 66. The *Metropolitan Life* Court explained the difference between ordinary and complete preemption as such:

> Federal preemption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court. *Gulley v. First National Bank*, 1099 U.S. 109 (1936). One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely preempt a

> particular area that any civil complaint raising the select group of claims is necessarily federal in character. For twenty years, this Court has singled out claims preempted by § 301 of the LMRA for such special treatment.[2]

Metropolitan Life, 481 U. S. at 60. In *Taylor*, the Court noted that, "Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) [of ERISA] removable to federal court." *Id.* at 66. However, there is no similar "clear manifest of intent" to make causes of action within the scope of the National Bank Act removable to federal court. In fact, the *M. Nahas* Court specifically recognized that national banks have been denied removal of claims even though the National Bank Act would ultimately control all or part of a plaintiff's state law action. *M. Nahas*, 930 F.2d at 608.

2. *There Is No Evidence Of Any Intent To Displace State Causes Of Action By The National Banking Act.*

In order for there to be complete preemption, the preemptive force of a federal statute must be "so powerful" as to "displace entirely any state cause of action." In the LMRA context, the Courts have held that the congressional

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2. Defendant's concerns that somehow they are without the ability to use their ordinary preemption defense in the Alabama state courts is unfounded. Alabama courts have a long history of applying the doctrine of ordinary preemption to §§ 85 and 86 of the National Bank Act. *Helms v. First Alabama Bank, N.A.*, 386 So. 2d 450 (Ala. 1980); *Florence R. R. & Improvement Co. v. Chase National Bank*, 17 So. 720 (Ala. 1895). The denial of federal jurisdiction does not preclude the defense of preemption. *Smith v. GTE Corporation*, 236 F.3d 1292 (11th Cir. 2001).

intent is present to preempt any cause arising out of an employer/employee relationship covered by a collective bargaining agreement. This complete preemption power in the LMRA context has been stated in the following terms. "The necessary ground of decision [in Avco] was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'" *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983), quoted in *Metropolitan Life*, *supra*. It is clear, even under Eighth Circuit precedent, that the National Bank Act does not displace entirely any cause of action between a person and a national bank, or where the National Bank Act that is implicated. *See M. Nahas*, *First National Bank of Aberdeen*, *supra*. As such, the doctrine of complete preemption simply does not apply.

In fact, the text of the National Bank Act shows just the opposite. The text of the NBA shows that it was intended that National Banking Associations could be sued in the state courts. When Congress replaced the 1963 Act in 1964, the statutory language provided for "Suits, actions and proceedings, against any association under this act, may be had in any circuit, district, or territorial court . . . or in any state county, or municipal court in the county or city in which said association is located . . ." *Mercantile Nat'l Bank at Dallas v. Longdeau*, 371 U.S. 555 (1963), citing 13 Stat. 116-17. Even today the Act at 12 U.S.C. § 24 states that a National Association shall have the power, "To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." 12 U.S.C. § 24. Clearly, it was not the intent of Congress when the National Bank Act was granted, nor is it the intent today, that National Banking Associations only be subject to suit in the federal courts.

The subsections of the National Bank Act that are at issue in the present case were initially enacted as § 30 of the National Bank Act of 1864, which is now codified at 12 U.S.C. §§ 85-86[3] and state as follows:

> Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, **interest at the rate allowed by the laws of the State**, Territory or District where the bank is located, or at a rate of one per centum in excess of the discount rate on 90-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where the laws of any State a different rate is limited for banks organized under state laws, if the rate so limited shall be allowed for associations organized or existing in any such state under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve or charge a rate not exceeding 7 per centum, or one per centum in excess of the discount rate on 90-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in

3. Sections 85 and 86 were enacted into law by Congress *before* the existence of federal jurisdiction as enacted under 28 U.S.C. § 1331. The first version of § 1331 was enacted on March 3, 1875, ch. 137, § 1, 18 Stat. 470. *See Franchise Tax Board of State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 8, 103 S. Ct. 2841, 2845, 77 L. Ed. 2d 420 (1983).

> advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States or a District of Columbia shall be at the rate allowed by the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. At the purchase, discount, or sale of a bonafide bill of exchange, payable to another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange per site drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

12 U.S.C. § 85 (emphasis added).

> The taking, receiving, reserving, or charging a rate of interest greater than is allowed by § 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: provided, that such action is commence within two years from the time the usurus transaction occurred.

12 U.S.C. § 86.

The National Bank Act, 12 U.S.C. § 85, vests the *states* with the authority to legislate and establish interest rate limitations. As such, it is highly unlikely that Congress intended to confer complete federal preemption through the adoption of the laws of the several states. *Cf. Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207 (11th Cir. 1999) (super preemption applies when Congress comprehensively occupies a field of law and is necessarily federal in character). In this case, Appellees argue that the laws of Delaware control the loan interest rate, rather than the laws of Alabama, where the loans were issued. Yet, on the other hand, it is clear that the National Bank Act would *not* preempt or otherwise apply to an interest rate claim by an Alabama consumer against an Alabama bank. The same is true with any Delaware consumer against a Delaware bank. This in itself illustrates that the National Bank Act does not displace the field of state interest rate regulation.

In a thorough analysis of precedent on the issue, the United States District Court for the Southern District of Alabama ruled that the National Bank Act *does not* confer complete preemption over state law claims for excessive interest. In *Jones v. BankBoston, N.A.*, 115 F. Supp. 2d 1350 (S.D. Ala. Oct. 2, 2000), the Court engaged in a significant analysis of the Congressional intent and history of the National Bank Act.

> [T]he significance to complete preemption analysis of jurisdictional language paralleling that of the LMRA is dependent on whether the jurisdictional language was enacted after the 1968 *Avco*[4] decision; only then may it be inferred that

4. *Avco Corp. v. Aero Lodge No. 735, International Assoc. of Machinists & Aerospace Workers*, 390 U.S. 557, 88 S. Ct. 1235, 20 L. Ed. 2d 126 (1968).

> Congress, by its use of such language, desired to mimic the complete preemption embedded in the LMRA. Because the National Bank Act's jurisdictional provision was enacted a century before *Avco*, it cannot be construed as an effort to invoke complete preemption by parallelism . . . Even if closely parallel jurisdictional language carried any significance with respect to statutes enacted before 1968, the National Bank Act's jurisdictional provision does not closely parallel that of the LMRA.
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> The most striking difference between the National Bank Act and the LMRA, however, lies in their treatment of state court jurisdiction; while the LMRA is silent, the National Bank Act expressly contemplates state court jurisdiction. Thus the National Bank Act's jurisdictional provision varies materially in every respect from the jurisdictional language common to the LMRA and ERISA. Such a jurisdictional provision cannot be said to "closely parallel" the LMRA for purposes of complete preemption analysis.

Jones, 115 F. Supp. 2d at 1358. The *Jones* Court went on to analyze the faulty reasoning of the *M. Nahas* decision.

> The Eighth Circuit's reliance on the existence of an "exclusive federal remedy" without any further showing of congressional intent is not only inconsistent with *BLAB TV*, by which this Court is bound, but also appears to contradict *Metropolitan Life v. Taylor* itself . . . were the existence of an "exclusive federal remedy" the

> only requirement for complete preemption, the *Metropolitan Life* Court would have concluded its analysis at this point and declared the Plaintiffs' claims completely preempted. Rather than doing so, the Court noted it would be "reluctant" to grant complete preemption on so slender a basis and instead launched into its explication of the statute and its legislative history. . . . This Court is aware of no other appellate court utilizing the Eighth Circuit's lenient test for complete preemption and is neither empowered nor inclined to adopt it.

Jones, 115 F. Supp. 2d at 1356 (citations omitted in original).

In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987), the Supreme Court held that express statutory language and Congressional intent to displace entirely any state cause of action was *required* for the application of the doctrine of complete preemption. The Court examined language of the jurisdictional subsection of ERISA's civil enforcement provisions and determined that Congress had clearly manifested an intent to make state causes of action removable to federal court. *Taylor*, 481 U.S. at 65, 107 S. Ct. at 1547. The Supreme Court clarified its holding on complete preemption by stating that:

> [E]ven with a provision such as [ERISA] § 502(a)(1)(B) that lies at the heart of a statute with the unique pre-emptive force of ERISA, however, we would be reluctant to find that extraordinary preemptive power, such as has been found with respect to § 301 of the L.M.R.A., that converts an ordinary state common law complaint

> into one stating a federal claim for purposes of the well-pleaded Complaint rule.

Taylor, 481 U.S. at 65, 107 S. Ct. at 1547 (internal citations omitted).

The Third Circuit, in the case of *Spellman v. Meridian Bank (Delaware)*, 1995 WL 764548,[5] explained the Supreme Court precedent as to complete preemption in words far more elegant than this writer could summon.

> The Supreme Court has held affirmative evidence of Congressional intent could be the touchstone of the federal district court's removal jurisdiction and, as discussed above, the court has found such intent only rarely. The complete preemption doctrine was originally rooted in a cause of action arising under § 301 of the L.M.R.A. The court extended the doctrine reluctantly, in *Metropolitan Life*, to an action arising under ERISA. The court wrote that it did so only because "ERISA's civil enforcement provisions closely parallels [sic] that of § 301 of the L.M.R.A.," and because explicit language in the ERISA Conference Report analogized the ERISA provision to the L.M.R.A.

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5. The *Spellman* opinion is available as a 1995 West law cite, and was not published in the Federal Reporter. Following the panel opinion, the Third Circuit voted to grant rehearing *en banc* and vacated the panel opinion. The appeal was dismissed before any *en banc* opinion was issued. The appeal was dismissed in July of 1996 pursuant to the Supreme Court's ruling in *Smiley v. CitiBank*, 517 U.S. 735 (1996) which involved a technical definition of "interest" and did not involve the issue of complete preemption.

language. In the absence of explicit direction from Congress, the court wrote:

> [e]ven with a provision such as 502(a)(1)(B) [the jurisdictional provision] that lies at the heart of a statute with the unique pre-emptive force of ERISA . . . we would be reluctant to find that extraordinary pre-emptive power, such as that has been found with respect to 301 of the L.M.R.A., that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.

Neither the National Bank Act nor DIDA contains a jurisdictional provision evidencing Congressional intent to permit removal of the sort relied upon in *Avco* and *Metropolitan Life*. Nor have the banks pointed to Congressional language suggesting that parties may bring suit against banks in federal court without regard to the citizenship of the parties or the amount in controversy.

Congressional intent to permit removal based on complete preemption would be difficult to divine from the legislative history of the National Bank Act, because the act was passed in 1864, pre-dating federal question jurisdiction, the well pleaded complaint rule, and the doctrine of complete preemption. The banks argue, nonetheless, that Congress evidenced an intent to provide an exclusive source of relief for claims

> of overcharge that, coupled with the general federal provision allowing for removal of federal question cases, demonstrates Congressional intent to allow removal. However, the defendants point to nothing in the legislative history of §§ 85 and 86 that present the sort of clear indication of Congressional intent we have looked for in the past.
>
> There appears to be no indication that Congress intended to completely preempt the regulation of national banks or federally-insured state lending institutions. Therefore we will reverse the judgments of the district court that found complete preemption.

Spellman, 1995 WL 764548, *6-7 (internal quotations omitted).

The requirements specifically articulated by the Supreme Court are not met in this case — there is neither statutory language nor Congressional intent that the National Bank Act displaces entirely the Plaintiffs' state law causes of action.[6] Further examination of the absence of complete

6. Defendants' assertion that congressional intent cannot possibly be gleaned as to removal under the National Bank Act because it was enacted before general federal question jurisdiction, and before removal was allowed, is not true. First, when Congress enacted the National Bank Act in 1864, it provided that suit could be brought in federal or state court. *See, supra*. Moreover, had the Congress wished to provide for removal of suits under the National Bank Act, it could have done so. At the time, Congress had provided in a handful of civil acts that federal law would both provide a defense, and while for removal of a cause of action from state to

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preemption in the National Bank Act by the District Court for the Southern District of Florida has held that banking is not an area in which Congress has evidenced an intent to occupy the entire field to the exclusion of the states, and thus state legislatures may legislate in all areas not expressly or impliedly preempted by federal legislation. *Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp. 2d 1041 (S.D. Fla. 1998).

> The determination of the maximum amount of interest which may be charged for the use of money loaned has always been within the police power of the state, and the details of the exceptions to the legislation have rested within the discretion of the state legislature. In § 85 of the Bank Act, Congress expressly and unambiguously stated that a national bank was subject to the interest provision of the laws of the state in which the bank was located.

Video Trax., 33 F. Supp. 2d at 1050 (S.D. Fla. 1998) (internal citations omitted).

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federal court. *See, e.g.*, Act of March 3, 1863, 12 Stat. 755 (amended by the Act of May 11, 1866, 14 Stat. 46), Congress provided for a federal defense and provided the right of removal of civil or criminal actions arising out of acts committed under federal authority during the Civil War. *See Mayor & Alderman of City of Nashville v. Cooper*, 73 U.S. 247 (1867); *Michael T. Collins, the Unhappy History of Federal Question and Removal*, 71 Iowa Law Review 717, 720-21 (1986). Simply put, had Congress, at the time, it intended that suits arising out of the National Bank Act be litigated only in the state courts, Congress had the ability to provide for such extraordinary jurisdiction. It chose not to do so with regard to the National Bank Act.

There is no question that interest rates are determined by state law. There is no legislative language evidencing Congressional intent that state-law actions relating to interest rate claims against national banks are to be considered as arising under federal law for purposes of removal jurisdiction. There is no indication that the National Bank Act's jurisdictional language is intended to function in the same manner of Section 301 of the LMRA, or § 502(a) of ERISA, pursuant to the guidance of the Supreme Court in *Metropolitan Life v. Taylor*. *See BLAB TV*, 132 F.3d at 857. Defendants cannot extrapolate the doctrine of complete preemption and claim that the laws of the State of Delaware, through the application of 12 U.S.C. § 85 and "super preemption", create federal subject matter jurisdiction.

At best, the provisions of the National Bank Act only create a defense based upon the factual application of interest regulations between the several States and relies on interpretation of the *laws of a particular state*. Therefore, removal of the Plaintiffs' case was improper since a case cannot be "removed on the basis of a federal defense, including the defense of preemption." *Caterpillar*, 482 U.S. at 393; *Kemp v. International Bus. Mach. Corp.*, 109 F.3d 708, 714 (11th Cir. 1997).

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — COMPLAINT

**IN THE CIRCUIT COURT OF
SUMTER COUNTY, ALABAMA**

Civil Action No.: _____

**MARTHA SUE HARE; OTIS JENNINGS;
MILDRED P. SMITH; and WILLIE E. SMITH;**

Plaintiffs,

vs.

**H & R BLOCK EASTERN TAX SERVICES, INC.;
H & R BLOCK, INC.; BENEFICIAL NATIONAL
BANK; and BENEFICIAL TAX MASTERS, INC.,**

Defendants.

There may be other entities whose true names and identities are unknown to the Plaintiffs at this time who may be legally responsible for the claim(s) set forth herein who may be added by amendment by the Plaintiffs when their true names and identities are accurately ascertained by further discovery. Until that time, the Plaintiffs will designate these parties in accordance with Rule 9(h), Alabama Rules of Civil Procedure. The word "entity" as used herein is intended to refer to and include any and all legal entities including individual persons, any and all forms of partnerships, any and all types of corporations and unincorporated associations. The symbol by which these party Defendants are designated is intended to include more than one entity in the event that discovery reveals that the descriptive characterization of the

symbol applies to more than one "entity." In the present action, the party Defendants which the Plaintiffs must include by descriptive characterization are as follows: "A", "B" & "C", whether singular or plural, being the entity that was the finance company described below that committed the wrongful acts alleged in Plaintiffs' Complaint, and/or the entity on whose behalf the agent in question was acting; "D", "E" & "F", whether singular or plural, being that entity or persons, other than those entities and persons described above, which is the successor in interest, or the assignee, or which undertook the duties, or assumed the liabilities of any of the entities described herein. Plaintiff alleges that the identities of the fictitious party-Defendants are otherwise unknown at this time, or, if known, their identities as proper party-Defendants are not known, but their true names will be substituted by amendment when ascertained.

COMPLAINT

1. Plaintiff, Martha Sue Hare, is a resident citizen of Sumter County, Alabama and is over the age of nineteen years.

2. Plaintiff, Otis Jennings, is a resident citizen of Sumter County, Alabama and is over the age of nineteen years.

3. Plaintiff, Mildred P. Smith, is a resident citizen of Sumter County, Alabama and is over the age of nineteen years.

4. Plaintiff, Willie E. Smith, is a resident citizen of Sumter County, Alabama and is over 5.The Defendant H & R Block Eastern Tax Services, Inc. (hereinafter "Eastern Tax Services")

is a foreign corporation doing business in Sumter County, Alabama at all times relevant to the facts herein.

6. The Defendant H & R Block, Inc. (hereinafter "HRB) is a foreign corporation doing business in Sumter County, Alabama at all times relevant to the facts herein.

7. The Defendant Beneficial National Bank (hereinafter "Beneficial) is a foreign corporation doing business in Sumter County, Alabama at all times relevant to the facts herein. Upon information and belief, Beneficial was acquired and/or merged with Household International, Inc. on or about June 1998.

8. The Defendant Beneficial Tax Masters (hereinafter "Tax Masters") is a foreign corporation doing business in Sumter County, Alabama. Upon information and belief, Tax Masters was acquired and/or merged with Household International, Inc. on or about June 1998.

9. There may be other entities whose true names and identities are unknown to the Plaintiffs at this time who may be legally responsible for the claim(s) set forth herein who may be added by amendment by the Plaintiffs when their true names and identities are accurately ascertained by further discovery. Until that time, the Plaintiffs will designate these parties in accordance with Rule 9(h), Alabama Rules of Civil Procedure. The word "entity" as used herein is intended to refer to and include any and all legal entities including individual persons, any and all forms of partnerships, any and all types of corporations and unincorporated associations. The symbol by which these party Defendants are designated

is intended to include more than one entity in the event that discovery reveals that the descriptive characterization of the symbol applies to more than one "entity." In the present action, the party Defendants which the Plaintiffs must include by descriptive characterization are as follows: "A", "B" & "C", whether singular or plural, being the entity that was the finance company described below that collected fees or interest and/or committed the wrongful acts alleged in Plaintiffs' Complaint, and/or the entity on whose behalf the agent in question was acting; "D", "E" & "F" whether singular or plural, being that entity or persons, other than those entities and persons described above, which is the successor in interest, or the assignee, or which undertook the duties, or assumed the liabilities of any of the entities described herein. Plaintiff alleges that the identities of the fictitious party-Defendants are otherwise unknown at this time, or, if known, their identities as proper party-Defendants are not known, but their true names will be substituted by amendment when ascertained.

JURISDICTION AND VENUE

10. The events giving rise to the claims in this Complaint originated in Sumter County, Alabama. Upon information and belief, Defendants and Fictitious Party Defendants presently conduct business by agent in Sumter County, Alabama, and have done so at all times relevant to this Complaint. Venue is proper in the Circuit Court of Sumter County, Alabama as to Defendants and Fictitious Defendants pursuant to *Ala. Code* § 6-3-7 (1975) and Alabama Rule of Civil Procedure.

11. Plaintiffs do not plead any cause of action under any federal law. Each Plaintiff individually seeks judgment against Defendants joint and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff.

FACTUAL ALLEGATIONS

12. Each named Plaintiff retained the services of the Defendants as tax professionals.

13. The Defendants undertook a confidential relationship with each Plaintiff and established the trust and confidence for professional advice for taxation matters.

14. Defendants held themselves out to be financial advisors functioning on behalf of the interest of the Plaintiffs.

15. Defendants made refund anticipation loans to each of the named Plaintiffs and charged the Plaintiffs for tax refund anticipation loans.

26. Upon information and belief, Defendants maintained a fee sharing agreement under which the Defendants profited by making the refund anticipation loans. The assessment of costs and fees has damaged the Plaintiffs.

17. Defendants have wrongfully charged Plaintiffs for excessive fees relating to refund anticipation loans.

Appendix A

COUNT I
INTENTIONAL MISREPRESENTATIONS

18. Plaintiffs reallege and incorporate by reference the foregoing paragraphs 1 through 17 and further aver as follows:

19. Defendants misrepresented material facts to the Plaintiffs which facts include, but are not limited to, the following:

(a) the costs paid by the Plaintiffs.

(b) the Plaintiffs fees and costs would be substantially higher than those disclosed due to the Defendants' receipt of loan repayments.

(c) the Defendants utilized unreasonable repayment periods to calculate the costs of the loan.

20. Defendants actions constituted conduct involving actual malice, or, in the alternative, were a part of a pattern or practice of intentional wrongful conduct.

21. Defendants intended for Plaintiffs to rely upon the misrepresentations described hereinabove, and Plaintiffs reasonably and justifiably relied on those representations to their detriment by:

(a) paying excessive interest and fees to the Defendants;

(b) foregoing the use of their money; and

(c) suffering mental anguish.

Appendix A

22. As a direct and proximate consequence of Defendants actions, Plaintiffs have been injured and damaged as identified herinabove.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs demand judgment against Defendants jointly and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff, in an amount to be determined by a jury.

COUNT II
SUPPRESSION OF MATERIAL FACTS

23. Plaintiffs reallege and incorporate by reference the foregoing paragraphs 1 through 22 and further aver as follows:

24. Defendants, withheld, concealed, and suppressed from Plaintiffs certain material facts which the Defendants were under a duty to communicate to them, based upon a confidential relationship of the parties or the facts of this particular case.

25. The material facts which the Defendants withheld, concealed, and suppressed from Plaintiffs include, but are not limited to, the following:

(a) the loan cost paid by the Plaintiffs exceeded the costs to the plaintiffs.

(b) the Plaintiffs' costs would be substantially higher than the costs disclosed due to the Defendants' receipt of loan repayments.

(c) the Defendants utilized unreasonable repayment periods to calculate the loan costs.

26. Defendants intended for Plaintiffs to rely upon the suppressions described hereinabove, and Plaintiffs reasonably and justifiably relied on those suppressions to Plaintiffs' detriment by:

(a) paying excessive costs and fees to the Defendants;

(b) foregoing the use of their money; and

(c) suffering mental anguish.

27. Defendants' actions were fraudulent, malicious, wanton, gross and/or oppressive, and were intended to injure or defraud Plaintiffs.

28. Defendants' actions constituted conduct involving actual malice, or, in the alternative, were a part of a pattern or practice of intentional wrongful conduct.

29. As a direct and proximate consequence of Defendants' conduct, Plaintiffs have been injured and damaged as described hereinabove.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs demand judgment against Defendants jointly and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff, in an amount to be determined by a jury.

COUNT III
BREACH OF FIDUCIARY DUTY

30. Plaintiffs reallege and incorporate by reference each fact contained in paragraphs 1 through 29 above, and in the counts below, as if pleaded separately herein.

31. By virtue of the relationship of the Plaintiffs and Defendants, the facts suppressed by the Defendants, and the superior knowledge and bargaining position of the Defendants, a confidential and fiduciary relationship arose between the Plaintiffs and the Defendants. Plaintiffs reposed confidence and trust in Defendants, and relied on Defendants' duties to act in the best interest of the Plaintiffs.

32. Defendants breached their duty to the Plaintiffs and failed to disclose the Defendants' licencing agreement. Defendants' breach their duty and failed to notify the Plaintiffs of a conflict of interest in profiting from the licensing arrangement.

33. Plaintiffs further relied on Defendants' actions and representations and were induced by Defendants to pay excessive costs and fees, when Plaintiffs otherwise would not have paid excessive costs and fees.

34. Defendants had a duty to make financial decisions in the interest of the Plaintiffs.

35. Defendants and their agents recklessly breached their fiduciary duty to Plaintiffs by suppressing the following material facts:

(a) the costs paid by the Plaintiffs exceeded the costs disclosed to the plaintiffs.

(b) the Plaintiffs costs would be substantially higher than that disclosed due to the Defendants' receipt of loan repayments.

(c) the Defendants utilized unreasonable repayment periods to calculate the loan costs.

36. Defendants breached their fiduciary duties described hereinabove, and Plaintiffs suffered damages as follows:

(a) paying excessive costs and fees to the Defendants;

(b) foregoing the use of their money; and

(c) suffering mental anguish.

37. As a direct and proximate consequence of Defendants actions, Plaintiffs have been injured and damaged as identified herinabove.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs demand judgment against Defendants jointly and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff, in an amount to be determined by a jury.

PLAINTIFFS DEMAND TRIAL BY STRUCK JURY

APPENDIX B — IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION DATED AND FILED SEPTEMBER 6, 2002

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

Civil Action No.: CV-02-C-1848-W

MARTHA SUE HARE; OTIS JENNINGS; MILDRED P. SMITH; and WILLIE E. SMITH;

Plaintiffs,

vs.

H & R BLOCK EASTERN TAX SERVICES, INC.; H & R BLOCK, INC.; BENEFICIAL NATIONAL BANK; and BENEFICIAL TAX MASTERS, INC.,

Defendants.

Filed September 6, 2002

PLAINTIFFS' MOTION TO LIFT STAY AND REMAND TO STATE COURT

COME NOW the Plaintiffs, Martha Sue Hare, Otis Jennings, Mildred P. Smith, and Willie E. Smith, by and through their attorney of record, and respectfully request that this Honorable Court lift the stay in this case and order remand to state court. In support of this motion, Plaintiffs state as follows:

Appendix B

A nearly identical case filed against Beneficial National Bank an H&R Block on behalf of several residents of Piekens County, Alabama was recently remanded to state court for lack of subject matter jurisdiction. *See Tracy Brewer, et al. v. H&R Block Eastern Tax Services, Inc., et al.*, CV-02-N-1772-W (N.D. Ala. Sept. 3, 2002) (J. Nelson) (See attached Exhibit "A"). In the *Brewer* case, the plaintiffs allege identical causes of action against the same defendants in the instant case. In that case, District Judge Edwin Nelson denied defendants' Motion to Stay and Ordered remand to state court. The court stated as follows:

OVERRULED WITHOUT PREJUDICE

s/ U.W. Clemon — 10/9/02
JUDGE — DATE

Supreme Court U.S.
FILED
JAN 7 2003
OFFICE OF THE CLERK

No. 02-306

IN THE

Supreme Court of the United States

BENEFICIAL NATIONAL BANK AND
BENEFICIAL TAX MASTERS, INC.,
Petitioners,

v.

MARIE ANDERSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY MEMORANDUM

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January 2003

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RULE 29.6 LIST

Household International, Inc. is the parent of Beneficial National Bank and Beneficial Tax Masters, Inc. and is publicly held.

TABLE OF CONTENTS

	Page
RULE 29.6 LIST	i
1. Additional Claims and Additional Defendants Do Not Defeat Removal	3
2. Respondents Misinterpret the Conservative, Narrow Position Taken by Petitioners	5
3. This is Not a Case of a "Federal Defense" But a Case of an Exclusively Federal Claim	7
4. The Incorporation of A Federally Designated State Law Into the Alternative Standard Provided By Section 30 of the National Bank Act Does Not Make the Claim Any Less Federal	8
CONCLUSION	9

TABLE OF AUTHORITIES

CASES

	Page
Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968)	5, 6
Barnett Bank v. Nelson, 517 U.S. 25 (1996)	5
Caterpillar Inc. v. Williams, 482 U.S. 386 (1987)	8
Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 505-06 (1962)	8
City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156 (1997)	3, 4
Evans v. National Bank of Savannah, 251 U.S. 108 (1919)	1, 9
Farmers' and Mechanics' Nat'l Bank v. Dearing, 91 U.S. 29 (1875)	1, 9
In Re Prudential Sales Practice Litigation, 148 F.3d 283 (3d Cir. 1998)	4
Krispin v. May Dep't Store Co., 218 F.3d 919 (8th Cir. 2000)	2, 4, 5
M. Nahas & Co. v. First Nat'l Bank of Hot Springs, 930 F.2d 608 (8th Cir. 1991)	2, 3, 4
Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299 (1978)	1, 9
McCollum v. Hamilton Nat'l Bank, 303 U.S. 245 (1938)	8
Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987)	5, 6
Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996)	2, 9
Spellman v. Meridian Bank, Nos. 94-3203, 94-3204, 94-3215 to 94-3218, 1995 WL 764548 (3d Cir. Jan. 12, 1996), *vacated and set for reh'g en banc*, 1996 U.S. App. LEXIS 2506 (3d Cir. Feb. 16, 1996	6

TABLE OF AUTHORITIES—Continued

	Page
United Mine Workers v. Gibbs, 383 U.S. 715 (1966)	3
Video Trax, Inc. v NationsBank, N.A., 33 F. Supp. 2d 1041 (S.D. Fla. 1998)	8

FEDERAL STATUTES

National Bank Act, Section 30, 12 U.S.C. § 85	1, 2, 8
National Bank Act, Section 30, 12 U.S.C. § 86	1, 8, 9
28 U.S.C. § 1331	3, 6, 8
28 U.S.C. § 1332	7
28 U.S.C. § 1367(a)	3, 4
28 U.S.C. § 1441	2, 4, 6
28 U.S.C. § 1446	7
29 U.S.C. § 185(a)	6
29 U.S.C. § 1132(a)(1)(B)	6
29 U.S.C. § 1132(e)(1)	- 9

IN THE

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No. 02-306

BENEFICIAL NATIONAL BANK AND
BENEFICIAL TAX MASTERS, INC.,
Petitioners,

v.

MARIE ANDERSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY MEMORANDUM

Respondents have sued a national bank for charging excessive interest and fees with regard to a loan. Respondents recognize and acknowledge they are suing a national bank: They designate the bank by its name which includes its title as a national bank. A suit against a national bank for charging excessive interest and fees is governed exclusively by federal law—in particular, by the provisions of Section 30 of the National Bank Act, 12 U.S.C. §§ 85 and 86. *Evans v. National Bank of Savannah*, 251 U.S. 108, 109, 114 (1919); *Farmers' and Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 34-35 (1875); *see Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299,

308 (1978).[1] Respondents' claim thus necessarily, and inherently, arises under and is controlled by federal law. That being so, it could have been filed in a Federal District Court; and accordingly, the suit is removable under 28 U.S.C. § 1441.

If the Complaint had cited the applicable sections of the United States Code or indeed had been silent on the matter of governing law, the case clearly would have been removable. However, even though federal law exclusively governs their claim for excessive interest and fees against a national bank, Respondents seek to preclude removal by wrongly alleging that the suit was brought under Alabama law and by expressly disclaiming any reliance on federal law. Respondents claim that they have thereby made the suit non-removable. But Respondents could not validly disclaim reliance on federal law; federal law is a necessary basis of Respondents' claim.

Respondents do not seem to deny that there is a conflict between the circuits over the issue of whether removal of a usury suit against a national bank can be defeated through this artifice.[2] Instead, they attempt to distinguish the Eighth Circuit decisions which conflict with the decision below, *Krispin v. May Dep't Stores*, 218 F.3d 919 (8th Cir. 2000); and *M. Nahas & Co. v. First Nat'l Bank of Hot Springs*, 930 F.2d 608 (8th Cir. 1991). Respondents also claim the issue presented in the Petition is narrow and unimportant. But the Eighth Circuit cases are not distinguishable and, as shown by the volume of reported cases we have cited, Pet. 8-10, 12 n.8, and indeed by the cases Respondents themselves have cited, Op. 2, 12, 15, 18, schemes of this sort, designed to disguise

[1] "[T]here is no question that [12 U.S.C.] § 85 [Section 30 of the National Bank Act] pre-empts state law." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996).

[2] For another example of the technique, *see* Exhibit A to the Opposition.

the *inherent* federal law character of these usury suits, appear to have become quite common. The importance of this case, and of the issue presented, is further demonstrated by the fact that the Comptroller of the Currency elected to file an amicus curiae brief in support of Petitioners' position in the Court of Appeals. *See* Pet. App. 38a-58a. This Court should grant *certiorari* to decide whether this legal fiction works to oust a federal district court of jurisdiction over a claim that can only arise under the National Bank Act.

1. Additional Claims and Additional Defendants Do Not Defeat Removal.

Respondents claim that, by adding claims against entities that are not national banks and by including separate but related state-law claims of fraud and breach of duty, they have made the suit non-removable or, at least, have made this case substantively different from *Nahas*. Op. 3-5, 9. However, it is plain that if any claim under 28 U.S.C. § 1331 is made against any defendant in a multi-defendant, multi-issue suit, the entire case is removable, and all related claims and all defendants "come along" to federal court under the supplemental jurisdiction statute, 28 U.S.C. § 1367(a). That statute provides that:

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.[3] Such supplemental jurisdiction shall

[3] Claims are part of the same "constitutional case" if they "derive from a common nucleus of operative fact." *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164-65 (1997) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)). A quick review of the allegations and structure of the Complaint here demonstrates that the claims derive from

include claims that involve the joinder or intervention of additional parties.[4]

Clearly, § 1367 "applies with equal force" to removed cases and to cases initially filed in federal court, because "a removed case is necessarily one 'of which the district courts . . . have original jurisdiction.'" *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165 (1997) (quoting 28 U.S.C. § 1441(a)).

Respondents claim also that the Eighth Circuit decisions are distinguishable, because they address free-standing usury claims, unaccompanied by any state law claims. Op. 3-5. The presence of state law claims here, however, is immaterial and does not serve to distinguish *Nahas* from this case: The district court was empowered by § 1367 to exercise supplemental jurisdiction over those additional related claims, and therefore they do not defeat the jurisdiction of the district court on removal. Moreover, contrary to Respondents'

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the same core facts. The counts allege varying wrongs resulting from the same common scheme asserted in the "Factual Allegations" (Complaint ¶¶ 32-37), and repeated in each of the five counts. *See In Re Prudential Sales Practice Litigation*, 148 F.3d 283, 303 (3d Cir. 1998) ("That implementation of Prudential's scheme resulted in a variety of unlawful transactions does not negate the common basis they all shared."). Moreover, in one of the cases in which the Eighth Circuit held that the NBA completely preempted state usury claims, *Krispin v. May Dep't Stores*, 218 F.3d 919 (8th Cir. 2000), the court of appeals reversed the district court's refusal to grant plaintiffs' alternative request for leave to amend to assert claims under the NBA, and directed the district court to reassert supplemental jurisdiction over state law claims for breach of contract, breach of duty of good faith and fair dealing, misrepresentation, unjust enrichment, and civil conspiracy. 218 F.3d at 925. Thus, the credit relationship served as a common nucleus of operative fact for the federal claim and for all of these state law claims.

[4] Petitioner in 02-312, H & R Block, Inc. ("Block"), is not a national bank but was joined as a defendant in a single suit in state court. Block joined Petitioners in the notice of removal.

suggestion (Op. 4), *Krispin* did involve several state law claims, and the Eighth Circuit not only upheld removal, but directed the district court to exercise its supplemental jurisdiction over those state law claims. 218 F.3d at 925.

2. Respondents Misinterpret the Conservative, Narrow Position Taken by Petitioners.

Respondents urge that because the National Bank Act does not make all state laws totally inapplicable to national banks but, rather, leaves certain of the activities of national banks to be governed at least to some extent by state law,[5] this case is different from *Avco Corp. v. Aero Lodge* No. 735, 390 U.S. 557 (1968), and from *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987). Respondents accordingly claim that the teaching of those cases cannot be applicable here. But Petitioners do not claim that all cases against national banks, or all cases in which the National Bank Act may be implicated, are removable. Rather, what they do maintain, and what is at issue here, is that suits for usury on the part of national banks are removable, because the particular subject matter of usury by a national bank is governed exclusively by the National Bank Act ("NBA").

Respondents argue that "complete preemption" is a narrow doctrine; that may well be so, but here it is to be applied very narrowly—to usury suits against national banks where clearly the only governing law that provides the right and remedy is a federal statute. Indeed, the exclusivity of federal law as the basis of the usury claim here is at least as clear and strong as it was with respect to the claims under the Labor Management Relations Act ("LMRA") and the Employee Retirement Income Security Act ("ERISA") that this Court found to be preempted in *Avco* and in *Taylor*. *See Avco*, 390 U.S. at 559-60 (complete preemption based on section 301(a)

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[5] *See Barnett Bank v. Nelson*, 517 U.S. 25, 33 (1996), for a general list.

of LMRA, 29 U.S.C. § 185(a), which provides federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees . . . or between any such labor organizations"); *Taylor*, 481 U.S. at 60 n.1, 67 (complete preemption based on section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), which provides for a civil action "by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan").

In those cases, a broad panoply of contract claims or claims for breach of fiduciary duty were recognized to be "arising under" claims within § 1331 even though the preempting federal statutes govern a potential multiplicity of issues and never mention the precise types of claims found to be preempted in *Avco* and *Taylor*. Here, in contrast, a narrow, detailed federal statute governs the subject of usury for national banks. Consequently, the application of the doctrine of "complete preemption" here is more clear and even more appropriate than it was in this Court's two earlier cases.[6] Congress intended that all such usury claims "arise under" federal law; and so the removal statute, § 1441, in turn represents its will that all such suits are removable at the option of the defendant.

[6] In Respondents' effort to articulate the complete preemption doctrine and to offer reasons why it is not applicable to the National Bank Act, they rely on a lengthy quotation from the divided panel opinion in *Spellman v. Meridian Bank*, Nos. 94-3203, 94-3204, 94-3215 to 94-3218, 1995 WL 764548 (3d Cir. Jan. 12, 1996), *vacated and set for reh'g en banc*, 1996 U.S. App. LEXIS 2506 (3d Cir. Feb. 16, 1996). Op. 15-17. That opinion was vacated in light of a strong dissent and set for rehearing *en banc* before the appeal was dismissed, as indeed Respondents acknowledge in a footnote. Op. 15 n.5.

3. This is Not a Case of a "Federal Defense" But a Case of an Exclusively Federal Claim.

Respondents say that what is involved in this case is a federal defense and that what is called the well-pleaded complaint rule would be violated if removal were tolerated here. Op. 7-8. But this is not a case involving removal based upon a defense extraneous to the Complaint—such as, release, limitations, immunity from suit, or the like. Respondents' Complaint on its face reflects that a national bank is being sued for usury, that is for charging excessive fees and interest. Complaint at ¶¶ 58-62 (alleging "Usury Violations"); *see id.* at ¶¶ 35-37 (asserting in "Factual Allegations" section that Defendants charged excessive fees and interest). The well-pleaded factual assertions show that there can *only* be a federal claim made here, because federal law displaces state law on the entire matter of the fees and interest a national bank may charge. There is no issue of a "defense" left to be pleaded by the defendants. The allegation of the Complaint that Alabama law is involved in the usury claim is necessarily a sham and is no more to be respected than if the citizenship of a party were wrongfully asserted by a plaintiff to avoid removal in a diversity case.[7]

[7] Indeed, cases of this sort seem usually to be brought in the home-state courts of the plaintiffs with the defendants being out-of-state national banks and other out-of-state companies. The Complaint in the Opposition's Exhibit A gives an example of the abuse involved to defeat removal on "diversity" (28 U.S.C. § 1332) grounds. The complaint disclaims any recovery above an amount slightly less than the required jurisdictional amount in § 1332. *See* Op. 7a, 9a, 11a. After the case has been on file for a year, that limitation can be amended out of the complaint without fear of removal (*see* 28 U.S.C. § 1446(b)), pleas for punitive damages can then likewise be added, etc. The use of the usury issue presumably turns on persuading the judge to give an instruction on state law usury or on convincing the jury to award damages for alleged "excessive interest" or "charges" under the rubric of the ancillary state law claims of violation of fiduciary duties or the like.

4. The Incorporation of A Federally Designated State Law Into the Alternative Standard Provided By Section 30 of the National Bank Act Does Not Make the Claim Any Less Federal.

As a final effort, Respondents are reduced to claiming that 12 U.S.C §§ 85 and 86 provide for state law. Thus, in effect, they say that a suit for usury against a national bank does not arise under federal law. The texts of §§ 85 and 86 are quoted in their entirety, highlighting the phrase "interest at the rate allowed by the laws of the State . . . ." Op. 10, 18-19 (citing *Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp. 2d 1041 (S.D. Fla. 1998)). Acceptance of Respondents' state law theory would mean that a usury suit against a national bank would not come under § 1331 for any purpose.

What Respondents are highlighting, however, is part of the statutory mechanism by which Congress incorporated state usury law into the NBA to define the permissible rates of interest and federalized any claim of usury as applied to national banks. Congress did not create a federal usury claim to stand alongside a state claim; it took the law of a state *it* defined—the state referred to in the bank's charter—added as an alternative a purely federal standard (based on the Federal Reserve discount) and provided an exclusive detailed federal remedy. The language in §§ 85 and 86 that Respondents point to is an excellent example of a "federal statute . . . that . . . 'converts an ordinary common law complaint into one stating a federal claim . . . .'" Op. 5, quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987), the very situation that defines a case of complete preemption; indeed, the process of federalism is more thorough here than it was in *Caterpillar* and *Avco*.

Sections 85 and 86 represent federal law, not state law. Such a suit is maintainable under § 1331 and is removable if brought in state court. *See McCollum v. Hamilton Nat'l Bank*, 303 U.S. 245, 249 (1938) ("[T]he penalty for usury

may be enforced only in a suit for that purpose . . . [and] shall be paid according to the terms of [12 U.S.C. § 86]."). This Court has made it plain that the sole basis for claiming usury against a national bank is the National Bank Act. *Evans v. Nat'l Bank of Savannah*, 251 U.S. 108, 109 (1919) (stating that "whether transactions by [a national bank] are usurious and the consequent penalties therefor[ ] must be ascertained upon a consideration of the National Bank Act.") (emphasis added). *See also Farmers' and Mechanics' Nat'l Bank v. Dearing, supra*, 91 U.S. at 34-35; *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., supra*, 439 U.S. at 308.[8] Thus, with respect to the propriety or excessiveness of interest and fees charged by a national bank, State law is completely preempted, as set forth in *Smiley*, p. 2 n.1, above.

CONCLUSION

There is a clear and acknowledged conflict between Circuits. The issue in question is one frequently litigated, as the submissions of both the Petitioners and Respondents make clear. The issue is also of vital importance to national banks and their regulator. If *certiorari* is denied, however, this issue will no longer be litigated in federal courts in Alabama or in the rest of the states in the Eleventh Circuit, but will instead be subsumed under the legal fiction of a mythical state law of usury against national banks, to be pleaded in the complaint and then used in state court, after the

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[8] A (somewhat inconsistent) argument is made by Respondents (Op. 9, 13) that the concurrent federal and state court jurisdiction vitiates any intent by Congress to allow removal regardless of artful pleading by a plaintiff. The argument is baseless; there is such concurrent jurisdiction under the relevant provisions of LMRA and ERISA as well. *See Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 505-06 (1962) (LMRA); ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1). Nonetheless, the rule of decision in them is federal, as it is here, and removal is available despite artful pleading, as it should be here.

inevitable (and unreviewable) remand, for purposes best known to the plaintiffs. The Respondents' opposition indicates, we submit, additional reasons for granting the writ, not reasons for denying it.

For the reasons stated in the Petition and herein, the Petition for Certiorari should be granted.

Respectfully submitted.

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No. 02-306

Supreme Court, U.S.
FILED
MAR 5 2003
CLERK

IN THE

Supreme Court of the United States

BENEFICIAL NATIONAL BANK AND
BENEFICIAL TAX MASTERS, INC.,
Petitioners,

v.

MARIE ANDERSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

JOINT APPENDIX

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March 2003

PETITION FOR CERTIORARI FILED AUGUST 26, 2002
CERTIORARI GRANTED JANUARY 24, 2003

88 pp

TABLE OF CONTENTS

Page

Docket Entries for *Anderson v. H&R Block, Inc.*, Docket No. 01-11863-JJ, in the United States Court of Appeals for the Eleventh Circuit 1

Docket Entries for *Anderson v. H&R Block, Inc.*, Case No. 00-CV-1457, in the United States District Court for the Middle District of Alabama..... 5

Docket Entries for *Anderson v. H&R Block, Inc.*, Case: CV 2000 000088.00, in the Circuit Court of Barbour County, Alabama 16

Complaint in *Anderson v. H&R Block, Inc.*, No. CV-2000-088, filed in the Circuit Court of Barbour County, Alabama, Clayton Division..... 18

Notice of Removal for *Anderson v. H&R Block, Inc.*, No. 00-C-1457-N, filed in the United States District Court for the Middle District of Alabama, Northern Division..... 31

Exhibits to Notice of Removal..... 36

(Placeholder for the Opinion of the Middle District of Alabama, *see* Petition 21a) 82

Order of the United States Court of Appeals for the Eleventh Circuit filed April 10, 2001 granting permission to appeal pursuant to 28 U.S.C. § 1292(b)... 83

(Placeholder for Opinion of the United States Court of Appeals for the Eleventh Circuit, *see* Petition 1a)..... 84

(Placeholder for the Order of the United States Court of Appeals for the Eleventh Circuit denying the Petition for Rehearing En Banc, *see* Petition 29a)..... 85

(Placeholder for the Order of the United States Court of Appeals for the Eleventh Circuit granting a stay of the issuance of the mandate, *see* Petition 36a) 86

UNITED STATES COURT OF APPEALS
11TH CIRCUIT—ATLANTA

Docket No. 01-11863-JJ

MARIE ANDERSON, ALVESTER BRAFORT, WALTER BRUTLEY, PATRICIA COLEMAN, TALAYA COPE, AUDREY DARBY, ANNIE DAVIS, APRIL DELOACH, DIANE FRANKLIN, LILLIE FRANKLIN, WILLIE LEWIS, CALEDONIA JACKSON, SHIRLEY JERNIGAN, EVELYN NELSON, WILLIE LAWRENCE, MAMIE MITCHELL, BETTY PERSON, DIANE PETERSON, GWEN ROGERS, WILLIAM SCREWS, ERNESTINE STARKS, GERALD STOKES, ALBERT THOMAS, CHARLES THOMAS, KENNETH WILLIAMS, EARLINE YOUNG

Plaintiffs-Appellants,

v.

H & R BLOCK, INC.
BENEFICIAL NATIONAL BANK
BENEFICIAL TAX MASTERS, INC.

Defendants-Appellees.

DOCKET ENTRIES

DATE	PROCEEDINGS
01/31/01	Fee Status: Paid (01/31/01) for Marie Anderson
04/10/01	DKT-10 Letter issued
04/10/01	Order Transferring From Misc. # 01-90003-F
04/10/01	Probable Jurisdiction Noted (order granting permission to appeal)
04/19/01	Appearance Form Submitted: Jeff S. Daniel
04/19/01	Appearance Form Submitted: K. Stephen Jackson

DATE	PROCEEDINGS
04/20/01	Transcript order form-no transcript requested: Appellant-Anderson, Marie (Atty: K. Stephen Jackson)
04/20/01	Civil Appeal Statement Form: Appellant-Anderson, Marie (Atty: K. Stephen Jackson)
04/23/01	Appearance Form Submitted: Burt M. Rublin
04/24/01	Briefing Notice Issued Br-1-civ
04/24/01	BR1CIV (Brief Letter 1) issued.
04/26/01	Appearance Form Submitted: A. Inge Selden III
04/26/01	Appearance Form Submitted: Peter Sean Fruin
04/26/01	Appearance Form Submitted: Stephen Clark Jackson
05/03/01	Appearance Form Submitted: Stewart M. Cox
05/16/01	Record Excerpts pt'd (bound on side, COS) M:5/25
05/16/01	Appellant's Brief Filed: PT'D (OA, Stament of issues and case, print size) M:525 Appellant-Anderson, Marie (Atty: K. Stephen Jackson) thru: Appellant-Young, Earline (Atty: K. Stephen Jackson)
05/17/01	BR8CIV (Brief deficiency letter) issued.
05/17/01	EXC-1CIV (Excerpts—Deficient) issued. To: Jackson, K. Stephen
05/18/01	Certificate of Readiness
06/18/01	Appellee Brief Filed: Beneficial National Bank, and Beneficial Tax Masters, Inc., signed by Burt Rublin

DATE	PROCEEDINGS
06/19/01	Appellee Brief Filed: Appellees-H & R Block, Inc., Beneficial H & R Block, Inc., National Bank & Beneficial Tax Masters, Inc. (atty: A. Inge Selden III)
06/25/01	Amicus Brief: Amicus Curiae Comptroller of the Currency
06/27/01	Record on Appeal
07/02/01	Reply Brief Filed: Appellant-Anderson, Marie, et al. (Atty: K. Anderson, Marie Stephen Jackson)
10/17/01	Supplemental Authority for Appellee: Appellee-H & R Block, (Atty: Stephen Jackson)
11/01/01	Oral Argument Scheduled: 11/01/01
11/02/01	Jeff S. Daniel argued for Appellant; Burt M. Rublin argued for Appellee; Stephen Clark Jackson argued for Appellee
04/03/02	Judgment Entered
04/03/02	OPIN1A (Opinion—Issuance with Costs) issued. Cost taxed against defendants-appellees.
04/03/02	Opinion Issued REVERSED & REMANDED.
04/17/02	Appearance Form Submitted: Howard N. Cayne
04/24/02	Petition for Rehearing En Banc: Appellee-H & R Block, Inc., (Atty: Peter Sean Fruin)
04/24/02	Petition for Rehearing En Banc: Appellee-Beneficial National Bank, (Atty: Stewart M. Cox): Appellee-Beneficial Tax Masters, Inc., (Atty: Stewart M. Cox)

DATE	PROCEEDINGS
05/29/02	The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED.
05/29/02	REHG1 (Rehearing—Transmittal) issued.
06/05/02	Motion to Stay Mandate: Appellee-Beneficial National Bank, (Atty: Stewart M. Cox): Appellee-Beneficial Tax Masters, Inc., (Atty: Stewart M. Cox)
06/17/02	The motion of Appellees' Beneficial National Bank and Beneficial Tax Masters, Inc., for stay of mandate pending petition for writ is GRANTED to and including August 27, 2002. (CRW)(J)
06/17/02	Mandate Stayed
06/17/02	MOT2 (Motion—Court Action) issued.
08/27/02	Notice of filing: Appellee-Beneficial National Bank, (Atty: Stewart M. Cox [sic]) that they have filed cert with USSC
09/03/02	Notice of Filing Certiorari: Appellee-Beneficial National Bank, (Atty: Stewart M. Cox) 02-306
09/09/02	Notice of Filing Certiorari: Appellee-H & R Block, Inc., (Atty: Peter Sean Fruin) 02-312

U.S. DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
(Montgomery)

Civil Docket for Case # 00-CV-1457

MARIE ANDERSON, ALVESTER BRAFORT, WALTER BRUTLEY, PATRICIA COLEMAN, TALAYA COPE, AUDREY DARBY, ANNIE DAVIS, APRIL DELOACH, DIANE FRANKLIN, LILLIE FRANKLIN, WILLIE LEWIS, CALEDONIA JACKSON, SHIRLEY JERNIGAN, EVELYN NELSON, WILLIE LAWRENCE, MAMIE MITCHELL, BETTY PERSON, DIANE PETERSON, GWEN ROGERS, WILLIAM SCREWS, ERNESTINE STARKS, GERALD STOKES, ALBERT THOMAS, CHARLES THOMAS, KENNETH WILLIAMS, EARLINE YOUNG

Plaintiffs,

v.

H & R BLOCK, INC.
BENEFICIAL NATIONAL BANK
BENEFICIAL TAX MASTERS, INC.
Defendants.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
10/24/00	1	NOTICE OF REMOVAL w/attachments; FILING FEE $150.00 RECEIPT # 84208 (vmc) [Entry date 10/27/00]
10/24/00	1	COMPLAINT (vmc) [Entry date 10/27/00]

DATE	NO.	PROCEEDINGS
10/24/00	1	DEMAND for jury trial by Marie Anderson, Alvester Brafort, Walter Brutley, Patricia Coleman, Talaya Cope, Audrey Darby, Annie Davis, April Deloach, Diane Franklin, Lillie Franklin, Willie Lewis, Caledonia Jackson, Shirley Jernigan, Evelyn Nelson, Willie Lawrence, Mamie Mitchell, Betty Person, Diane Peterson, Gwen Rogers, Williams Screws, Ernestine Starks, Gerald Stokes, Albert Thomas, Charles Thomas, Kenneth Williams, Earline Young (vmc) [Entry date 10/27/00]
10/24/0[illegible]	2	NOTICE to circuit court clerk of filing of Notice of Removal by H & R Block, Inc., Beneficial Nat'l Bk, Beneficial Tax (vmc) [Entry date 10/27/00]
10/25/00	3	ANSWER to Complaint by Beneficial Nat'l Bk, Beneficial Tax , referred to Mag. Judge John L. Carroll (vmc) [Entry date 10/27/00]
10/27/00	—	Notice of Assignment to US Mag. Judge mailed to plaintiff and dfts attys (vmc) [Entry date 10/27/00]
10/27/00	—	file referred to Judge Carroll (vmc) [Entry date 10/27/00]
11/1/00	—	CASE reassigned to Judge W. H. Albritton III (vmc) [Entry date 11/01/00]
11/1/00	—	file referred to Judge Albritton (vmc) [Entry date 11/01/00]
11/1/00	4	ANSWER to Complaint by H & R Block, Inc., referred to Judge W. H. Albritton III (vmc) [Entry date 11/01/00]

DATE	NO.	PROCEEDINGS
11/2/00	5	ORDER set Rule 16 Status Conference 8:30 11/28/00 before Judge W. H. Albritton III (signed by Judge W. H. Albritton III) , copies provided; furn: yg hc el.(vmc) [Entry date 11/02/00]
11/14/00	6	NOTICE of Attorney Appearance for H & R Block, Inc. by Peter S. Fruin (vmc) [Entry date 11/15/00]
11/22/00	7	MOTION by Marie Anderson, Alvester Brafort, Walter Brutley, Patricia Coleman, Talaya Cope, Audrey Darby, Annie Davis, April Deloach, Diane Franklin, Lillie Franklin, Willie Lewis, Caledonia Jackson, Shirley Jernigan, Evelyn Nelson, Willie Lawrence, Mamie Mitchell, Betty Person, Diane Peterson, Gwen Rogers, Williams Screws, Ernestine Starks, Gerald Stokes, Albert Thomas, Charles Thomas, Kenneth Williams, Earline Young to Remand referred to Judge W. H. Albritton III (vmc) [Entry date 11/27/00]
11/22/00	8	BRIEF by Marie Anderson, Alvester Brafort, Walter Brutley, Patricia Coleman, Talaya Cope, Audrey Darby, Annie Davis, April Deloach, Diane Franklin, Lillie Franklin, Willie Lewis, Caledonia Jackson, Shirley Jernigan, Evelyn Nelson, Willie Lawrence, Mamie Mitchell, Betty Person, Diane Peterson, Gwen Rogers, Williams Screws, Ernestine Starks, Gerald Stokes, Albert Thomas, Charles Thomas, Kenneth Williams, Earline Young in support of motion to Remand referred to Judge W. H: Albritton III (vmc) [Entry date 11/27/00]

DATE	NO.	PROCEEDINGS
11/28/00	9	ORDER TO SHOW CAUSE as to why plaintiffs' motion to remand should not be granted: Response to Order to Show Cause due on 12/6/00 for Beneficial Tax, for Beneficial Nat'l Bk, for H & R Block, Inc. set reply brief deadline for 12/13/00 for Earline Young, for Kenneth Williams, for Charles Thomas, for Albert Thomas, for Gerald Stokes, for Ernestine Starks, for Williams Screws, for Gwen Rogers, for Diane Peterson, for Betty Person, for Mamie Mitchell, for Willie Lawrence, for Evelyn Nelson, for Shirley Jernigan, fcr Caledonia Jackson, for Willie Lewis, for Lillie Franklin, for Diane Franklin, for April Deloach, for Annie Davis, for Audrey Darby, for Talaya Cope, for Patricia Coleman, for Walter Brutley, for Alvester Brafort, for Marie Anderson motion to Remand by plaintiffs set for submission on 12/13/00 (signed by Judge W. H. Aibritton III) , copies provided. (vmc) [Entry date 11/28/00]
12/1/00	10	NOTICE of Attorney Appearance for Beneficial Nat'l Bk by Hope T. Stewart (vmc) [Entry date 12/04/00]
12/5/00	12	BRIEF by Beneficial Nat'l Bk, Beneficial Tax in opposition to motion to Remand; w/Exh. Attached referred to Judge W. H. Albritton III (vmc) [Entry date 12/07/00]
12/6/00	11	BRIEF by H & R Block, Inc. in opposition to motion to Remand, referred to Judge W. H. Albritton III. (nna) [Entry date 12/06/00]

DATE	NO.	PROCEEDINGS
12/13/00	13	REPLY by Marie Anderson, Alvester Brafort, Walter Brutley, Patricia Coleman, Talaya Cope, Audrey Darby, Annie Davis, April Deloach, Diane Franklin, Lillie Franklin, Willie Lewis, Caledonia Jackson, Shirley Jernigan, Evelyn Nelson, Willie Lawrence, Mamie Mitchell, Betty Person, Diane Peterson, Gwen Rogers, Williams Screws, Ernestine Starks, Gerald Stokes, Albert Thomas, Charles Thomas, Kenneth Williams, Earline Young in q brief in opposition by H & R Block, Inc., brief in opposition by Beneficial Tax, Beneficial Nat'l Bk referred to Judge W. H. Albritton III (vmc) [Entry date 12/13/00]
12/14/00	14	MEMORANDUM OPINION AND ORDER denying motion to Remand (signed by Judge W. H. Albritton III), copies provided (vmc) [Entry date 12/14/00]
12/15/00	15	MOTION for Alan S. Kaplinsky, Burt Rublin and Edward D. Rogers to Appear Pro Hac Vice FILING FEE $60.00 RECEIPT # 85141; w/cert. of Good Standing attached referred to Judge W. H. Albritton III (vmc) [Entry date 12/18/00]
12/18/00	16	ORDER granting motion for Alan S. Kaplinsky, Burt Rublin and Edward D. Rogers to Appear Pro Hac Vice FILING FEE $60.00 RECEIPT # 85141 (signed by Judge W. H. Albritton III) , copies provided. (vmc) [Entry date 12/18/00]

DATE	NO.	PROCEEDINGS
12/28/00	17	MOTION by Marie Anderson, Alvester Brafort, Walter Brutley, Patricia Coleman, Talaya Cope, Audrey Darby, Annie Davis, April Deloach, Diane Franklin, Lillie Franklin, Willie Lewis, Caledonia Jackson, Shirley Jernigan, Evelyn Nelson, Willie Lawrence, Mamie Mitchell, Betty Person, Diane Peterson, Gwen Rogers, Williams Screws, Ernestine Starks, Gerald Stokes, Albert Thomas, Charles Thomas, Kenneth Williams, Earline Young for certification for interloctory review under 28 U.S.C. 1292(h)i; referred to Judge W. H. Albritton III (cc) [Entry date 12/29/00]
1/3/01	18	ORDER TO SHOW CAUSE why the motion for certification filed 12-28-00 should not be granted; Response to Order to Show Cause due on 1/17/01 for Beneficial Tax, for Beneficial Nat'l Bk, for B & R Block, Inc.; setting the motion for submission on that day for determination without oral hearing (signed by Judge W. B. Albritton III) , copies provided to counsel. (djy) [Entry date 01/03/01]
1/17/01	19	RESPONSE by Beneficial Nat'l Bk, Beneficial Tax to [17-1] motion for certification for interlocutory review under 28 U.S.C. 1292(b) by plaintiffs referred to Judge W. B. Albritton III (vmc) [Entry date 01/18/01]
1/19/01	20	ORDER that the Memorandum Opinion and Order of this court entered on 12/14/00 is AMENDED to add the following paragraph as set out in order (signed by Judge W. H. Albritton III) , copies provided. (vmc) [Entry date 01/19/01]

DATE	NO.	PROCEEDINGS
1/31/01	21	MOTION by Marie Anderson, Alvester Brafort, Walter Brutley, Patricia Coleman, Talaya Cope, Audrey Darby, Annie Davis, April Deloach, Diane Franklin, Lillie Franklin, Willie Lewis, Caledonia Jackson, Shirley Jernigan, Evelyn Nelson, Willie Lawrence, Mamie Mitchell, Betty Person, Diane Peterson, Gwen Rogers, Williams Screws, Ernestine Starks, Gerald Stokes, Albert Thomas, Charles Thomas, Kenneth Williams, Earline Young to Stay proceedings and notice of filing petition for interlocutory review under 28 U.S.C. 1292(b) referred to Judge W. H. Albritton III (vmc) [Entry date 01/31/01]
1/31/01	21	NOTICE OF INTERLOCUTORY APPEAL of [14-1] order by Marie Anderson, Alvester Brafort, Walter Brutley, Patricia Coleman, Talaya Cope, Audrey Darby, Annie Davis, April Deloach, Diane Franklin, Lillie Franklin, Willie Lewis, Caledonia Jackson, Shirley Jernigan, Evelyn Nelson, Willie Lawrence, Mamie Mitchell, Betty Person, Diane Peterson, Gwen Rogers, Williams Screws, Ernestine Starks, Gerald Stokes, Albert Thomas, Charles Thomas, Kenneth Williams, Earline Young to the U.S. Court of Appeals, Eleventh Cirucuit. (Copies Provided) FILING FEE $ 105.00 RECEIPT # 86738 (hhk) [Entry date 04/19/01] [Edit date 04/19/01]

DATE	NO.	PROCEEDINGS
2/1/01	—	Received copy of MEMORANDUM TO COUNSEL OR PARTIES (dated January 31, 2001) from U.S. Court of Appeals, Eleventh Circuit advising that a Petition for Permission to Appeal pursuant to 28 USC 1292(b) has been filed, that any response which a party wishes to file must be received by this office on or before February 8, 2001, after which the motion and the response will be forwarded to the court for ruling without oral argument. [01-90003-F] (hhk) [Entry date 02/07/01]
2/2/01	22	Stamped ORDER granting [21-1] motion to Stay proceedings (by Judge W. H. Albritton III) , copies provided. (vmc) [Entry date 02/02/01]
4/13/01	23	ORDER (rendered April 10, 2001) of the U.S. Court of Appeals, Eleventh Circuit, GRANTING the petition for permission to appeal pursuant to 28 U.S.C. section 1292(b). Before: 11th Circuit Judge Stanley F. Birch Jr. Barkett and Marcus) copies provided. (hhk) [Entry date 04/17/01]
4/19/01	—	Notice of Appeal and certified copy of docket to USCA: [21-1] appeal by Earline Young, Kenneth Williams, Charles Thomas, Albert Thomas, Gerald Stokes, Ernestine Starks, Williams Screws, Gwen Rogers, Diane Peterson, Betty Person, Mamie Mitchell, Willie Lawrence, Evelyn Nelson, Shirley Jernigan, Caledonia Jackson, Willie Lewis, Lillie Franklin, Diane Franklin, April Deloach, Annie Davis, Audrey Darby,

DATE	NO.	PROCEEDINGS
		Talaya Cope, Patricia Coleman, Walter Brutley, Alvester Brafort, Marie Anderson (hhk) [Entry date 04/19/01]
4/19/01	—	Received Transcript Order Information Form from Appellants Atorney Jeffrey Daniel with notation, "No transcript is required for appeal purposes. [01-90003-F] (hhk) [Entry date 04/19/01]
4/19/01	—	USCA Case Number Re: [21-1] appeal by Earline Young, Kenneth Williams, Charles Thomas, Albert Thomas, Gerald Stokes, Earnestine Starks, Williams Screws, Gwen Rogers, Diane Peterson, Betty Person, Mamie Mitchell, Willie Lawrence, Evelyn Nelson, Shirley Jernigan, Caledonia Jackson, Willie Lewis, Lillie Franklin, Diane Franklin, April Deloach, Annie Davis, Audrey Darby, Talaya Cope, Patricia Coleman, Walter Brutley, Alvester Brafort, Marie Anderson USCA NUMBER: 01-90003-F (hhk) [Entry date 04/19/01]
5/16/01	—	CERTIFICATE OF READINESS of record on appeal mailed to USCA, 11th Circuit and counsel: [21-1] appeal by Earline Young, Kenneth Williams, Charles Thomas, Albert Thomas, Gerald Stokes, Ernestine Starks, Williams Screws, Gwen Rogers, Diane Peterson, Betty Person, Mamie Mitchell, Willie Lawrence, Evelyn Nelson, Shirley Jernigan, Caledonia Jackson, Willie Lewis, Lillie Franklin, Diane Franklin, April Deloach, Annie Davis, Audrey Darby, Talaya

DATE	NO.	PROCEEDINGS
		Cope, Patricia Coleman, Walter Brutley, Alvester Brafort, Marie Anderson (hhk) [Entry date 05/06/01]
6/12/01	—	REFERRAL JUDGE reassigned to Mag Judge Vanzetta P. McPherson (cc) [Entry date 06/12/01]
6/19/01	—	REQUEST for Record On Appeal from USCA re: [21-1] appeal by Earline Young, Kenneth Williams, Charles Thomas, Albert Thomas, Gerald Stokes, Ernestine Starks, Williams Screws, Gewn Rogers, Diane Peterson, Betty Peterson, Mamie Mitchell, Willie Lawrence, Evelyn Nelson, Shirley Jernigan, Caledonia Jackson, Willie Lewis, Lillie Franklin, Diane Franklin, April Deloach, Annie Davis, Audrey Darby, Talaya Cope, Patricia Coleman, Walter Brutley, Alvester Brafort, Marie Anderson (hhk) [Entry date 06/20/01]
6/20/01	—	Certified and transmitted Record on Appeal to U.S. Court of Appeals: [21-1] appeal by Earline Young, Kenneth Williams, Charles Thomas, Albert Thomas, Gerald Stokes, Ernestine Starks, Williams Screws, Gwen Rogers, Diane Peterson, Betty Person, Mamie Mitchell, Willie Lawrence, Evelyn Nelson, Shirley Jernigan, Caledonia Jackson, Willie Lewis, Lillie Franklin, Diane Franklin, April Deloach, Annie Davis, Audrey Darby, Talaya Cope, Patricia Coleman, Walter Brutley, Alvester Brafort, Marie Anderson [01-11863-JJ] (hhk) [Entry date 06/20/01]

DATE	NO.	PROCEEDINGS
6/29/01	—	ACKNOWLEDGMENT of RECEIPT of RECORD ON APPEAL from USCA Re: [21-1] appeal by Earline Young, Kenneth Williams, Charles Thomas, Albert Thomas, Gerald Stokes, Ernestine Starks, Williams Screws, Gwen Rogers, Diane Peterson, Betty Person, Mamie Mitchell, Willie Lawrence, Evelyn Nelson, Shirley Jernigan, Caledonia Jackson, Willie Lewis, Lillie Franklin, Diane Franklin, April Deloach, Annie Davis, Audrey Darby, Talaya Cope, Patricia Coleman, Walter Brutley, Alvester Brafort, Marie Anderson USCA Number: 01-11863-JJ (hhk) [Entry date 07/09/01]
9/14/01	—	REFERRAL JUDGE reassigned to Mag. Judge Delores R. Boyd (ydl) [Entry date 09/14/01]

IN THE CIRCUIT COURT
OF BARBOUR COUNTY

Case: CV 2000 000088.00

MARIE ANDERSON, ALVESTER BRAFORT, WALTER BRUTLEY, PATRICIA COLEMAN, TALAYA COPE, AUDREY DARBY, ANNIE DAVIS, APRIL DELOACH, DIANE FRANKLIN, LILLIE FRANKLIN, WILLIE LEWIS, CALEDONIA JACKSON, SHIRLEY JERNIGAN, EVELYN NELSON, WILLIE LAWRENCE, MAMIE MITCHELL, BETTY PERSON, DIANE PETERSON, GWEN ROGERS, WILLIAM SCREWS, ERNESTINE STARKS, GERALD STOKES, ALBERT THOMAS, CHARLES THOMAS, KENNETH WILLIAMS, EARLINE YOUNG

Plaintiffs,

v.

H & R BLOCK, INC.
BENEFICIAL NATIONAL BANK
BENEFICIAL TAX MASTERS, INC.

Defendants.

DOCKET ENTRIES

DATE	PROCEEDINGS
09/19/2000	ASSIGNED TO JUDGE HON. BURT SMITHART
	JURY TRIAL REQUESTED ORIGIN: INITIAL FILING

DATE	NO.	PROCEEDINGS
09/28/2000		SERVICE OF CERTIFIED MAI ON 09/25/2000 FOR 0003
		SERVICE OF CERTIFIED MAI ON 09/25/2000 FOR 0002
09/29/2000		SERVICE OF CERTIFIED MAI ON 09/25/2000 FOR 0001
10/24/2000		NOTICE OF FILING NOTICE OF REMOVAL TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION
10/25/2000		CASE ASSIGNED STATUS OF: DISPOSED DISPOSED ON: 10/24/2000 BY (RMVL FED COURT) (AV01) COURT ACTION JUDGE: HON. BURT SMITHART (AV01)

IN THE CIRCUIT COURT OF
BARBOUR COUNTY, ALABAMA
CLAYTON DIVISION

[Filed Sep. 19, 2000]

CIVIL ACTION
NO. CV-2000-088

MARIE ANDERSON, ALVESTER BRAFORT, WALTER BRUTLEY, PATRICIA COLEMAN, TALAYA COPE, AUDREY DARBY, ANNIE DAVIS, APRIL DELOACH, DIANE FRANKLIN, LILLIE FRANKLIN, WILLIE LEWIS, CALEDONIA JACKSON, SHIRLEY JERNIGAN, EVELYN NELSON, WILLIE LAWRENCE, MAMIE MITCHELL, BETTY PERSON, DIANE PETERSON, GWEN ROGERS, WILLIAM SCREWS, ERNESTINE STARKS, GERALD STOKES, ALBERT THOMAS, CHARLES THOMAS, KENNETH WILLIAMS, EARLINE YOUNG

Plaintiffs,

v.

H & R BLOCK, INC.
BENEFICIAL NATIONAL BANK
BENEFICIAL TAX MASTERS, INC.

Defendants.

There may be other entities whose true names and identities are unknown to the Plaintiffs at this time who may be legally responsible for the claim(s) set forth herein who may be added by amendment by the Plaintiffs when their true names and identities are accurately, ascertained by further discovery. Until that time, the Plaintiffs will designate these parties in accordance with Rule 9(h), Alabama Rules of Civil Procedure. The word "entity" as used herein is intended to refer to and include any and all legal entities including individual persons, any and all forms of partnerships, any and all types of corporations and incorporated associations. The

symbol by which these party Defendants are designated is intended to include more than one entity in the event that discovery reveals that the descriptive characterization of the symbol applies to more than one "entity." In the present action, the party Defendants which the Plaintiffs must include by descriptive characterization are as follows: "A", "TB" & "C", whether singular or plural, being the entity that was the finance company described below that committed the wrongful acts alleged in Plaintiffs' Complaint, and/or the entity on whose behalf the agent in question was acting; "D", "E" & "F", whether singular or plural, being that entity or persons, other than those entitles and persons described above, which is the successor in interest, or the assignee, or which undertook the duties, or assumed the liabilities of any of the entities described herein. Plaintiff alleges that the identities of the fictitious party-Defendants are otherwise unknown at this time, or, if known, their identities as proper party-Defendants are not known, but their true names will be substituted by amendment when ascertained.

COMPLAINT

1. The Plaintiff, Marie Anderson, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years.

2. The Plaintiff, Alvester Brafort, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years.

3. The Plaintiff, Walter Brutley, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years.

4. The Plaintiff, Patricia Coleman, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years.

5. The Plaintiff, Talaya Cope, is a resident citizen of Barbour County, Alabama and Cope, is over the age of nineteen years.

6. The Plaintiff, Audrey Darby, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years.

7. The Plaintiff, Annie Davis, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years.

8. The Plaintiff, April Deloach, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years.

9. The Plaintiff, Diane Franklin, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years.

10. The Plaintiff, Lillie Franklin, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years.

11. The Plaintiff, Willie Lewis, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years.

12. The Plaintiff, Caledonia Jackson, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years.

13. The Plaintiff, Shirley Jernigan, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years.

14. The Plaintiff, Evelyn Nelson, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years.

15. The Plaintiff, Willie Lawrence, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years.

16. The Plaintiff, Mamie Mitchell, is a resident citizen of Barbour County, Alabama and is over, the age of nineteen years.

17. The Plaintiff, Betty Person, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years

18. The Plaintiff, Diane Peterson, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years

19. The Plaintiff, Gwen Rogers, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years

20. The Plaintiff, Williams Screws, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years

21. The Plaintiff, Ernestine Starks, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years

22. The Plaintiff, Gerald Stokes, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years

23. The Plaintiff, Albert Thomas, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years

24. The Plaintiff, Charles Thomas, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years

25. The Plaintiff, Kenneth Williams, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years

26. The Plaintiff Earline Young, is a resident citizen of Barbour County, Alabama and is over the age of nineteen years

27. The Defendant H & R Block, Inc. (hereinafter "HRB) is a foreign corporation doing business in Barbour County, Alabama at all times relevant to the facts herein.

28. The Defendant Beneficial National Bank (hereinafter "Beneficial) is a foreign corporation doing business in Barbour County; Alabama at all times relevant to the facts herein. Upon information and belief, Beneficial was acquired and/or merged with Household International, Inc. on or about June 1998.

29. The Defendant Beneficial Tax Masters (hereinafter "Tax Masters") is a foreign corporation doing business in Barbour County, Alabama. Upon information and belief, Tax Masters was acquired and/or merged with Household International, Inc. on or about June 1998.

30. There may be other entities whose true names and identifies are unknown to the Plaintiffs at this time who may be legally responsible for the claim(s) set forth herein who maybe added by amendment by the Plaintiffs when their true names and identities are accurately ascertained by further discovery. Until that time, the Plaintiffs will designate these parties in accordance with Rule 9(h), Alabama Rules of Civil Procedure. The word "entity" as used herein is intended to refer to and include any and all legal entities including individual persons, any and all forms of partnerships, any and all types of corporations and unincorporated associations. The symbol by which these party Defendants are designated is intended to include more than one entity in the event that discovery reveals that the descriptive characterization of the

symbol applies to more than one "entity." In the present action, the party Defendants which the Plaintiffs must include by descriptive characterization are as follows: "A." "B" & "C" whether singular or plural, being the entity that was the finance company described below that collected fees or interest and/or committed the wrongful acts alleged in Plaintiffs' Complaint, and/or the entity on whose behalf the agent in question was acting; "D" "E" & "F" whether singular or plural, being that entity or persons, other than those entities and persons described above, which is the successor in interest, or the assignee, or which undertook the duties; or assumed the liabilities of any of the entities described herein. Plaintiff alleges that the identities of the fictitious party-Defendants are otherwise unknown at this time, or, if known, their identities as proper party-Defendants are not known, but their true names will be substituted by amendment when ascertained.

JURISDICTION AND VENUE

31. The events giving rise to the claims in this Complaint originated in Barbour County; Alabama. Upon information and belief Defendants and Fictitious Party Defendants. presently conduct business by agent in Barbour County, Alabama, and have done so at all times relevant to this Complaint, venue is proper in the Circuit Court of Barbour County, Alabama as to Defendants and Fictitious Defendants pursuant to *Ala. Code* § 6-3-7 (1975) and Alabama Rule of Civil Procedure 82. Plaintiffs do not plead any cause of action under any federal law. Each Plaintiff individually seeks judgment against Defendants joint and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff.

FACTUAL ALLEGATIONS

32. Each named Plaintiff retained the services of the Defendants as tax professionals.

33. The Defendants undertook a confidential relationship with each Plaintiff and established the trust and confidence for professional advice four taxation matters.

34. Defendants held themselves out to be financial advisors functioning on behalf of the interest of the Plaintiffs.

35. Defendants charged the Plaintiffs interest charges and fees for tax refunfund anticipation loans.

36. The interest charges were knowingly assessed by the Defendants and are in excess of the legal limit on interest rates allowed under Alabama statute and the common law doctrine of usury. The assessment of penalties and fees has damaged the plaintiffs.

37. Defendants have wrongfully charged Plaintiffs for excessive fees relating to refund anticipation loans (herein-after "RAL").

COUNT I
INTENTIONAL MISREPRESENTATIONS

38. Plaintiffs reallege and incorporate by reference the foregoing paragraphs 1 through 37 and further avers as follows:

39. Defendants misrepresented material facts to the Plaintiffs which facts include, but are not limited to, the following:

(a) the interest rate paid by the Plaintiffs exceeded the rate disclosed to the plaintiffs.

(b) the Plaintiffs fees and interest rate would be substantially higher than the rate disclosed due to the Defendants' receipt of loan repayments.

(c) the Defendants utilized unreasonable repayment periods to calculate the interest rate.

40. Defendants actions constituted conduct involving actual malice, or, in the alternative, were a part of a pattern or practice of intentional wrongful conduct.

41. Defendants intended for Plaintiff to rely upon the misrepresentations described hereinabove, and Plaintiffs reasonably and justifiably relied on those representations to their detriment by:

(a) paying excessive interest and fees to the Defendants;

(b) foregoing the use of their money; and

(c) suffering mental anguish.

42. As a direct and proximate consequence of Defendants actions, Plaintiffs have been injured and damaged as identified herinabove.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs demand judgment against Defendants joint and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff, in an amount to be determined by jury.

COUNT II
SUPPRESSION OF MATERIAL FACTS

43. Plaintiffs reallege and incorporate by reference the foregoing paragraphs 1 through 42 and further avers as follows:

44. Defendants, withheld, concealed, and suppressed from Plaintiff certain material facts which the Defendants were under a duty to communicate to them, based upon a confidential relationship of the parties or the facts of this particular case.

45. The material facts which the Defendants withheld, concealed, and suppressed from Plaintiff include, but are not limited to, the following:

(a) the interest rate paid by the Plaintiffs exceeded the rate disclosed to the plaintiffs.

(b) the Plaintiffs fees and interest rate would be substantially higher than the. rate disclosed due to the Defendants' receipt of loan repayments.

(c) the Defendants utilized unreasonable repayment periods to calculate the interest rate.

46. Defendants intended for Plaintiffs to rely upon the suppressions described hereinabove, and Plaintiff reasonably and justifiably relied on those suppressions to Plaintiffs' detriment by:

(a) paying excessive interest and fees to the Defendants;

(b) foregoing the use of their money; and

(c) suffering mental anguish.

47. Defendants' actions were fraudulent, malicious, wanton, gross and/or oppressive, and were intended to injure or defraud Plaintiffs.

48. Defendants' actions constituted conduct involving actual malice, or, in the alternative, were apart of a pattern or practice of intentional wrongful conduct.

49. As a direct and proximate consequence of Defendants' conduct, Plaintiffs have been injured and damaged as described hereinabove.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs demand judgment against Defendants joint and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff; in an amount to be determined by a jury.

COUNT III
BREACH OF FIDUCIARY DUTY

50. Plaintiffs reallege and incorporate by reference each fact contained in paragraphs 1 through 49 above, and in the counts below, as if pleaded separately herein.

51. By virtue of the relationship of the Plaintiffs and Defendants, the facts suppressed by the Defendants, and the superior knowledge and bargaining position of the Defendants, a confidential and fiduciary relationship arose between the Plaintiffs and the Defendants. Plaintiffs reposed confidence and trust in Defendants, and relied on Defendants' duties to act in the best interest of the Plaintiffs.

52. Defendants breached their duty to the Plaintiffs and failed to disclose the Defendants' licencing agreement. Defendants' breach their duty and failed to notify the Plaintiffs of a conflict of interest in profiting from the licensing arrangement.

53. Plaintiffs further relied on Defendants' actions and representations and were induced by Defendants to pay excessive interest and fees, when Plaintiffs otherwise would not have paid excessive interest and fees.

54. Defendants had a duty to make financial decisions in the interest of the Plaintiffs.

55. Defendants and their agents recklessly breached their fiduciary duty to Plaintiffs by suppressing the following material facts:

(a) the interest rate paid by the Plaintiffs exceeded the rate disclosed to the plaintiffs.

(b) the Plaintiff's fees and interest rate would be substantially higher than the rate disclosed due to the Defendants' receipt of loan repayments.

(c) the Defendants utilized unreasonable repayment periods to calculate the interest rate.

56. Defendants breached their fiduciary duties descried hereinabove, and Plaintiffs suffered damages as follows:

(a) paying excessive interest and fees to the Defendants;

(b) foregoing the use of their money; and

(c) suffering mental anguish.

57. As a direct and proximate consequence of Defendants actions, Plaintiffs have been injured and damaged as identified herinabove.

WHEREFORE, PREMISES CONSIDERED, Plaintiff demands judgment against Defendants joint and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff, in an amount to be determined by a jury.

COUNT IV
USURY VIOLATIONS

58. Plaintiffs reallege and incorporate by reference the foregoing paragraphs 1 through 57 and further avers as follows:

59. Defendants charged each Plaintiff excessive interest in violation of the common law usury doctrine.

60. Defendants have violated Alabama Code. § 8-8-1, et seq. by charging excessive interest on the Plaintiffs' tax refund.

61. Defendants breached their statutory and common law duties described hereinabove, and Plaintiffs suffered damages as follows:

(a) paying excessive interest and fees to the Defendants;

(b) foregoing the use of their money; and

(c) suffering mental anguish.

62. As a direct and proximate consequence of Defendants actions, Plaintiffs have been injured and damaged as identified herinabove.

WHEREFORE, PREMISES CONSIDERED, Plaintiff demands judgment against Defendants joint and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff, in an amount to be determined by a jury.

COUNT V
ALABAMA MINI CODE VIOLATIONS

63. Plaintiffs reallege and incorporate by reference the foregoing paragraphs 1 through 62 and further avers as follows:

64. Defendants have charged each Plaintiff excessive interest in violation of Alabama Code § 5-19-1, et seq., including but not limited to § 5-19-3, by charging excess interest on the Plaintiffs' RAL.

65. The excessive interest charges were knowingly assessed by the Defendants and were a deliberate violation of Alabama Code § 5-19-1, et seq.

66. The Defendants excessive interest charges were made with reckless disregard of the provisions of Alabama Code § 5-19-1, et seq.

67. Defendants breached their statutory and common law duties described hereinabove, and Plaintiffs suffered damages as follows:

(a) paying excessive interest and fees to the Defendants;

(b) foregoing the use of their money, and

(c) suffering mental anguish.

68. As a direct and proximate consequence of Defendants actions, Plaintiffs have been injured and damaged as identified herinabove.

WHEREFORE, PREMISES CONSIDERED, Plaintiff demands judgment against Defendants joint and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff, in an amount to be determined by a jury.

PLAINTIFF'S DEMAND TRIAL BY STRUCK JURY

/s/ Walter B. Calton
Walter B. Calton (CAL036)
John Hagood (HAG010)
CALTON, RUTLAND &
HAGOOD, L.L.C.
312 East Broad Sheet
Post Office Box 696
Eufaula, Alabama. 36027

/s/ K. Stephen Jackson
K. Stephen Jackson (JAC034)
Jeff S. Daniel (DAN034)
JACKSON, FRALEY &
SHUTTLESWORTH, P.C.
1740 Oxmoor Road
Suite E
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Telephone: (205) 870-9797
Facsimile: (205) 870-7956

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Filed Oct. 24, 2000]

CIVIL ACTION
NO. 00-C-1457-N

MARIE ANDERSON, ALVESTER BRAFORT, WALTER BRUTLEY, PATRICIA COLEMAN, TALAYA COPE, AUDREY DARBY, ANNIE DAVIS, APRIL DELOACH, DIANE FRANKLIN, LILLIE FRANKLIN, WILLIE LEWIS, CALEDONIA JACKSON, SHIRLEY JERNIGAN, EVELYN NELSON, WILLIE LAWRENCE, MAMIE MITCHELL, BETTY PERSON, DIANE PETERSON, GWEN ROGERS, WILLIAM SCREWS, ERNESTINE STARKS, GERALD STOKES, ALBERT THOMAS, CHARLES THOMAS, KENNETH WILLIAMS, EARLINE YOUNG

Plaintiffs,

v.

H & R BLOCK, INC.
BENEFICIAL NATIONAL BANK
BENEFICIAL TAX MASTERS, INC.

Defendants.

NOTICE OF REMOVAL

H&R Block, Inc. ("Block"), Beneficial National Bank and Beneficial Tax Masters, Inc. (collectively, "Beneficial"), defendants in the above-captioned action, hereby give Notice of Removal pursuant to 28 U.S.C. §1446(a). As grounds for removal, defendants aver the following:

1. On September 19, 2000, plaintiffs filed this action in the Circuit Court for Barbour County, Alabama, which was docketed as Case No. CV-2000-088. (Copies of the summons and complaint, as well as any other pleadings, process and orders served upon defendants in the state court action, are attached as Exhibit "A" to this Notice).

2. The Complaint was served on Block and Beneficial on September 25, 2000, and therefore this Notice is timely filed.

3. The Complaint asserts a claim that arises under the laws of the United States and is therefore subject to removal under 28 U.S.C. §§1331 and 1441.

4. This suit arises from tax refund anticipation loans ("RALs") made to Block customers by Beneficial. A RAL is a loan made to a tax preparation service customer by a bank in the amount of his or her anticipated tax refund, less the fees charged by the lender and the tax preparation service, which files the customer's tax return electronically. The customer authorizes the Government to deposit his or her tax refund directly into an account at the bank, thereby repaying the loan. A RAL enables a taxpayer to receive the amount of his or her anticipated tax refund, less applicable charges, within just a few days.

5. In Count IV of the Complaint, plaintiffs allege "Usury Violations" by the defendants. In particular, plaintiffs allege that "Defendants charged each plaintiff excessive interest in violation of the common law usury doctrine," and "Defendants have violated Alabama Code §8-81, et seq. by charging excessive interest on the Plaintiffs' tax refund." (Complaint, ¶¶59-b0). Every RAL at issue in the Complaint was originated by defendant Beneficial National Bank, a national banking association chartered pursuant to the National Bank Act and located in Wilmington, Delaware.

6. Section 85 of the National Bank Act, 12 U.S.C. §85, is the exclusive provision that governs the rate of interest that a national banking association (such as Beneficial National Bank) may lawfully charge.

> "Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located . . . ."

Thus, Beneficial was empowered under the National Bank Act to charge the interest rates allowed by its home state, Delaware, and could impose those interest rates throughout the country, notwithstanding usury ceilings in RAL borrowers' states. *See, e.g., Smiley v. Citibank (South Dakota), N.A.,* 517 U.S. 735 (1996); *Marquette National Bank v. First of Omaha Service Corp.,* 439 U.S. 299 (1978).

7. Section 86 of the National Bank Act, 12 U.S.C. §86, prescribes the exclusive remedies available against a national bank that charges interest in excess of what Section 85 of the National Bank Act permits.

> "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; *Provided,* That such action is commenced within two years from the time the usurious transaction occurred."

8. Plaintiffs have asserted a usury claim which necessarily arises under the National Bank Act, 12 U.S.C. §§85 and 86, since that Act creates an exclusive federal remedy against a national bank which charges excessive "interest." *Farmers' and Mechanics' National Bank V. Dearing,* 91 U.S. 29, 34-35 (1875); *McCollum v. Hamilton National Bank,* 303 U.S. 245, 248 (1938); *Evans v. National Bank of Savannah*, 251 U.S. 108, 109-09, 1 14 (1919); *Schuyler National Bank v. Gadsden*, 191 U.S. 451 (1903); *Carter v. Carusi,* 1 12 U.S. 478 (1884).

9. As a general matter, a cause of action arises under the laws of the United States only if a federal claim appears on

the face of the complaint. *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1 (1983). A preemption defense generally cannot be the basis of the original federal jurisdiction necessary for removal to federal court. *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58 (1987). However, there is an exception to this general rule where Congress has completely preempted a state law claim, which results in a recharacterization of the state law claim as a federal claim which may be removed to federal court. *Id.* at 66.

10. Sections 85 and 86 of the National Bank Act completely preempt state law and allow removal where, as here, a usury claim is made which alleges the charging of excessive interest.

11. A number of federal courts in Alabama and elsewhere around the country have held that the National Bank Act completely preempts state law claims alleging the charging of excessive interest. *See, e.g., Hunter v. Rich's Dept. Stores,* 945 F.Supp. 1500, 1508-1510 (N.D. Ala. 1995); *Fortenberry v. SouthTrust Bank of Alabama National Association,* 1996 U.S. Dist. LEXIS 21685 at *9-*12 (N.D. Ala. March 21,1996); *Moss v. South Trust Mobile Services, Inc., 1995* U.S. Dist. LEXIS 21770 at *5-*8 (N.D. Ala. Sept. 22, 1995).

12. The great weight of authority in other jurisdictions is in accord: *M. Nahas & Co. v. First National Bank of Hot Springs,* 930 F.2d 608 (8th Cir. 1991); *Krispin v. The May Department Stores Co.,* 218 F.3d 919, 922-924 (8th Cir. 2000); *Nelson v. Citibank (South Dakota) N.A.,* 794 F.Supp. 312 (D. Minn. 1992); *Hill v. Chemical Bank,* 799 F.Supp. 948 (D. Minn. 1992) (reaching same conclusion under §27 of the Federal Deposit Insurance Act); *Goehl v. Mellon Bank,* 825 F.Supp. 1239 (E.D. Pa. 1993); *Ament v. PNC National Bank,* 825 F.Supp. 1243 (W.D. Pa. 1992); *Watson v. First Union National Bank of South Carolina,* 837 F.Supp. 146 (D.S.C. 1993); *Beeman V. Mbank Houson, N.A.,* 691 F.Supp. 1027 (S.D. Tex. 1988).

13. Significantly, in a RAL case brought in Louisiana against Block, Chief Judge John Parker denied a motion to remand, finding that plaintiffs' claims, though couched in state law terms, were completely preempted by the National Bank Act. *Gallagher v. H&R Block Eastern Tax Services, Inc.,* No. 97-749-A (M.D. La. Jan. 13,1998) (attached as Exhibit "B"). This ruling was affirmed on appeal. *Battiste v. H&R Block,* 209 F.3d 719 (5th Cir. 2000) (per curiam).

14. Pursuant to 28 U.S.C. § 1441(d), a copy of this Notice of Removal is being filed with the Circuit Clerk of Barbour County, Alabama, and served upon counsel for all parties.

WHEREFORE, defendants Block and Beneficial hereby provide Notice of their removal of this action to the United States District Court for the Middle District of Alabama.

/s/ Stewart M. Cox
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Attorneys for Defendant
H&R Block, Inc.

SENDER COMPLETE THIS SECTION

Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
Print your name and address on the reverse so that we can return the card to you.
Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

H&R Block, Inc.
4400 Main Street
Kansas City, Missouri 64111

CV-2000-088
Pg1

2. Article Number (Copy from service label) 7000 0520 0014 4552 0687

PS Form 3811, July 1999 Domestic Return Receipt

SENDER COMPLETE THIS SECTION

Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
Print your name and address on the reverse so that we can return the card to you.
Attach this card to the back of the mailpiece, or on the front if space permits.

A. Received by (Please Print Clearly) B. Date of Delivery 9/25

1. Article Addressed to:

Beneficial Tax Masters Inc
c/o Household Intl Inc
2700 Sanders Road
Prospect Heights, IL
60070

CV-2000-088
D003

3. Service Type: Certified Mail, Express Mail, Registered, Return Receipt for Merchandise, Insured Mail, COD

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number (Copy from service label) 7000 0520 0014 4552 0694

PS Form 3811, July 1999 Domestic Return Receipt

SENDER COMPLETE THIS SECTION

Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
Print your name and address on the reverse so that we can return the card to you.
Attach this card to the back of the mailpiece, or on the front if space permits.

A. Received by (Please Print Clearly) B. Date of Delivery 9/25

1. Article Addressed to:

Beneficial National Bank
c/o Household Intl Inc
2700 Sanders Road
Prospect Heights, IL
60070

CV-2000-088
D002

3. Service Type: Certified Mail, Express Mail, Registered, Return Receipt for Merchandise, Insured Mail, COD

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number (Copy from service label) 7000 0520 0014 4552 0700

PS Form 3811, July 1999 Domestic Return Receipt

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7000 0520 0014 4552 0700

Postage	$ 1.43
Certified Fee	1.40
Return Receipt Fee (Endorsement Required)	1.25
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$ 4.08

CV-2000-088
D002

Postmark Here

Recipient's Name (Please Print Clearly) (To be completed by mailer)
Beneficial National Bank
Street, Apt. No.; or PO Box No.
2700 Sanders Road
City, State, ZIP+4
Prospect Heights, IL 60070

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7000 0520 0014 4552 0687

Postage	$ 1.43
Certified Fee	1.40
Return Receipt Fee (Endorsement Required)	1.25
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$ 4.08

CV-2000-088
D001

Postmark Here

H&R Block, Inc.
4400 Main Street
Kansas City, Missouri 64111

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7000 0520 0014 4552 0694

Postage	$ 1.43
Certified Fee	1.40
Return Receipt Fee (Endorsement Required)	1.25
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$ 3.80

CV-2000-088
D003

Postmark Here

Recipient's Name (Please Print Clearly) (To be completed by mailer)
Beneficial Tax Masters, Inc.
Street, Apt. No.; or PO Box No.
2700 Sanders Road
City, State, ZIP+4
Prospect Heights, Illinois 60070

PS Form 3800, February 2000 See Reverse for Instructions

BEST AVAILABLE COPY

IN THE CIRCUIT COURT OF
BARBOUR COUNTY,
ALABAMA CLAYTON DIVISION

[Filed _____]

CIVIL ACTION NUMBER
CV-2000-088

MARIE ANDERSON, ALVESTER BRAFORT, WALTER BRUTLEY, PATRICIA COLEMAN, TALAYA COPE, AUDREY DARBY, ANNIE DAVIS, APRIL DELOACH, DIANE FRANKLIN, LILLIE FRANKLIN, WILLIE LEWIS, CALEDONIA JACKSON, SHIRLEY JERNIGAN, EVELYN NELSON, WILLIE LAWRENCE, MAMIE MITCHELL, BETTY PERSON, DIANE PETERSON, GWEN ROGERS, WILLIAM SCREWS, ERNESTINE STARKS, GERALD STOKES, ALBERT THOMAS, CHARLES THOMAS, KENNETH WILLIAMS, EARLINE YOUNG

Plaintiffs,

v.

H & R BLOCK, INC.
BENEFICIAL NATIONAL BANK
BENEFICIAL TAX MASTERS, INC.

Defendants.

PLAINTIFFS' FIRST CONSOLIDATED DISCOVERY REQUEST TO DEFENDANT BENEFICIAL NATIONAL BANK

COME NOW the Plaintiffs pursuant to Alabama Rule of Civil Procedure 34, and hereby propound to the Defendant, Beneficial National Bank (hereinafter referred to as "Beneficial"), the following Interrogatories and Requests for Production, responses to which are due within thirty days after service.

(A) These discovery requests are continuing in character so as to require you to file supplementary answers if you obtain additional or different information before trial.

(B) You are requested to produce the original of each document together with all nonidentical copies and drafts of that document. If the original of any document cannot be located, a copy (identified as a copy) shall be provided in lieu thereof, and shall be legible and bound or stapled in the same manner as the original.

(C) Documents shall be produced as they are kept in the regular course of business. All documents shall be produced in the filed folder, envelope or other container in which the documents are kept or maintained..

(D) If after conducting a reasonable investigation you cannot respond to a Request, you should so state and answer to the extent that you can, stating what information you do have, what information you cannot provide and stating the efforts to locate and obtain the unknown information.

DEFINITIONS

For the purpose of these Requests for Production and as used herein, the following words shall have, and be construed with reference to, the following meanings and definitions:

(1) "Identify" when used in reference to a natural person shall mean to state his or her full name and current, last known, resident address, current employer, and current business address; when used with respect to a document (as hereinafter defined) "identify" means to state the date, subject or substance, author, all recipients, type of document (e.g., letter, telegram, memorandum, computer printout, sound reproduction, chart, etc.), its present location, and the identity of each of its current custodians, and shall include documents

(a) with respect to which a privilege it is, or may be, claimed and (b) documents which have been destroyed, lost, misplaced or damaged.

(2) "Document" and "documents" shall mean all documents subject to discovery under the Alabama Rules of Civil Procedure, and shall include, without limitation, every original and non-identical copy of each and every paper, document (including blind copies), letter, telegram, teletype, telex, telecopy, facsimile transmission, drawing, picture, photograph, negative, slide, movie, film, visual or audio transcription or record, memorandum, sketch, chart, report, note (including, but not limited to, notes used to prepare any letter, memorandum, report, or other document as herein defined), contract, agreement, change order, form, work sheet, memorandum or tape recording of telephone conversation or other conversation, witness (including, but not limited to, potential witness) interview, sound recording, sound recording transcription, engineering study, cross-section, plan, expert analysis, diary, journal, ledger, work memorandum, report of investigation and/or inspection, file memorandum, brochure, book, microfilm, tape, video tape, magnetic storage medium, exhibit, attachment, draft, certificate, chart, table, testimony, transcript of testimony, affidavit, printed or readable material, and any and all other means of storage and/or transmission of human intelligence.

(3) "Correspondence" shall mean any document carried by the United States Mail, the United States Postal Service, any private courier or courier service, facsimile, or transferred or transmitted in any manner whatsoever.

(4) "You" or "your" shall mean Beneficial National Bank and any named Defendant, any fictitious Defendant and/or it's affiliates, subsidiaries, it's present or future officers, directors, agents, employees, and any other persons acting or purporting to act for or on it's or it's parents', affiliates' or subsidiaries' behalf.

(5) "Person" or "individual" includes individuals, corporations, firms, sole proprietorships, partnerships, associations, trusts, and governmental agencies, bodies and officials.

(6) "Facts" include, but are not limited to, events, transactions, and occurrences, the location of such events, transactions, or occurrences, all of which concern (as herein defined), or are concerned with, in any way whatsoever, directly or indirectly, the interrogatory subject.

(7) "Incident" shall mean the facts and circumstances giving rise to the claims made the basis of this lawsuit.

(8) "Application(s)" shall mean those loan applications executed by Plaintiff.

(9) "Plaintiff" shall mean any named Plaintiff.

(10) "Defendant" shall mean any named defendant and shall include but not be limited to any company that has been purchased, acquired, merged with or controlled by Beneficial National Bank or a subsidiary or parent company of Beneficial National Bank. This Definition expressly includes any subsidiary or parent company of Household International, Inc. and/or Household Finance Corporation.

(11) "RAL" shall mean refund anticipation loan, or other loan product marketed and/or sold by the Defendants.

(12) Unless otherwise stated, these requests seek documents concerning the time period from 1987 to the present (the "relevant time period"). The documents to be produced include all documents prepared, dated, sent and/or received during the relevant time period.

INTERROGATORIES

1. Please state the name, date of birth, social security number, present business address, present employer and telephone number of each person who provided any information of whatever nature or description, relating to any of your answers to these interrogatories and request for production, and specify as to each person what interrogatories that person provided information for?

2. State the Defendant's correct legal name (i.e. the name in which it can sue or be sued).

3. State the name and address of each principal insurer of the Defendant who insured or reinsured the Defendant against risks or losses for the claims made the basis of this lawsuit, including any excess or umbrella carriers.

4. State whether the Defendant, its attorneys or any agents of the Defendant or its attorneys has secured, obtained or has any knowledge of any statement or account made by any person, including parties, whether written, recorded or oral, which pertain in any way to the occurrence made the basis of this lawsuit or any class action relating to tax refund loans and/or RAL loans. If so, state separately and severally the name and address of each person from whom a statement was obtained, the date the statement was obtained, and the person or either who has custody of said statement(s).

5. Identify all individuals to whom the Defendant has sold RAL loans from 1990 to the present day. Your response may be limited to claims for loans that were sold in the following Alabama Counties: Barbour, Bullock, Macon, Henry, Pike, Crenshaw, Butler, Montgomery Lowndes and Dallas.

6. Identify the name, last known address and title of each employee, agent or subcontractor that calculated,

analyzed, determined and/or performed interest rate calculations and/or functions for the RAL product.

7. Do you contend any person or entity other than you is, or may be, responsible in whole or part for the claims asserted against you in this lawsuit? If so, state the full name and address of each such person or entity, the legal basis for your contention, the facts or evidence upon which your contention is based, and whether or not you have notified each such person or entity of your contention.

8. List the name, last known address and telephone number of all persons who may have knowledge of the incidents described in the Complaint. Please state whether said person is currently employed by the Defendant, each person's title and the issues of which each identified person has knowledge.

9. List the name, last known address and telephone number of all persons who have been employed by H&R Block between 1990 and the present date. State whether said person is currently employed by the Defendant, each person's title and the dates of employment. Your response may be limited to claims for loans that were sold in the following Alabama Counties: Barbour, Bullock, Macon, Henry, Pike, Crenshaw, Butler, Montgomery Lowndes and Dallas.

10. Does the Defendant maintain a department, employee, or subcontractor responsible for reviewing, auditing or investigating interest collections and/or loan profitability? If so, state the name(s), title(s), employer and location of employment for said person(s).

11. List the name and address of each and every expert witness you plan to call at the trial of this case. State the following:

(a) his or her qualifications as an expert;

(b) the subject matter on which he or she is expected to testify;

(c) the expert witnesses' expected testimony.

12. If you contend that any of the documents requested herein below are privileged, provide the following information:

(a) Identify the document by the date it bears, or if none, the date it was written;

(b) Identify the document by the name and address of each person who wrote it or participated in the writing of it, by the name and address of each person to whom it was addressed, each person to whom a copy was identified as being directed and by the name and address of each person who received a copy of the document;

(c) Identify the document by the description of the document, as for instance, a "letter" or a "memorandum";

(d) Indicate the document's present location or custodian; or, if unknown, its last known location or custodian or indicate the location and custodian of any copies;

(e) Indicate the reason the document was not produced, i.e, attorney-client privilege, work-product privilege, etc.

13. If any of the documents requested herein below or any of the information requested above are not within your possession, custody or control at the time your responses to these discovery requests are due, please list;

(a) the last known location of the documents or information;

(b) the identity of any person or entity having information about the location of the requested documents and information.

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Produce a complete copy of each Plaintiffs loan account, tax files, computerized tax refund information, documents identifying each named Plaintiffs loan repayment and applications.

2. Produce any and all communication, of whatsoever nature, between this Defendant and each named Plaintiff.

3. Produce all documents that concern determination of annual percentage rates, and/or determination of interest rates and fees for refund anticipation loans.

4. Produce any and all documents, memoranda, correspondence and/or communication between H&R Block, Inc and Beneficial National Bank.

5. Produce any and all documents, memoranda, correspondence and/or communication between Beneficial National Bank and Beneficial Tax Masters, Inc.

6. Produce any and all documents, memoranda, correspondence and/or communication between Beneficial National Bank and the Internal Revenue Service that identifies and/or relates to any named Plaintiff.

7. Produce any and all documents, memoranda, correspondence and/or communication between Beneficial National Bank. and the Internal Revenue Service that identifies and/or relates to refund anticipation loan and/or the RAL program.

8. Produce all documents which identify and/or explain the establishment, location and access to the Defendants' archives or records storage.

9. Produce all documents, correspondence, memoranda, manuals and/or guides that relate to, identify and/or discuss loan applications and/or credit approval for refund anticipation loans.

10. Produce all documents, correspondence, memoranda, manuals and/or guides that relate to, identify and/or

discuss electronic fund transfers and/or funds received from the Internal Revenue Service.

11. Produce all documents, letters and memoranda regarding Defendants calculation, policy, plan, procedure, design and/or method of determining the finance charge for refund anticipation loans.

12. Produce all documents attached as exhibits to the depositions of any individual who was deposed in the case styled *Zawikowski v. Beneficial National Bank, et al.*, No. 98 C 2178 United Stats District Court, Northern District of Illinois.

13. Please produce copies of Beneficial's annual reports, balance sheet and statement of cash flows or other reports of Beneficial's financial condition for the past ten (10) years.

14. Please produce copies of the resume and/or curriculum vitae of each expert witness you expect to testify at trial and all reports received from each expert.

/s/ K. Stephen Jackson
K. Stephen Jackson - JAC034
Jeff S. Daniel - DAN034
JACKSON, FRALEY &
SHUTTLESWORTH, P.C.
1740 Oxmoor Road, Suite E
Birmingham, AL 35209
(205) 870-9797

Walter B. Calton
John Hagood
CALTON, RUTLAND &
HAGOOD, L.L.C.
312 East Broad Street
Post Office Box 696
Eufaula, Alabama 36027

DISCOVERY REQUESTS SERVED WITH ORIGINAL SUMMONS AND COMPLAINT

IN THE CIRCUIT COURT OF BARBOUR COUNTY,
ALABAMA CLAYTON DIVISION

[Filed _____]

CIVIL ACTION NUMBER
CV-2000-088

MARIE ANDERSON, ALVESTER BRAFORT, WALTER BRUTLEY, PATRICIA COLEMAN, TALAYA COPE, AUDREY DARBY, ANNIE DAVIS, APRIL DELOACH, DIANE FRANKLIN, LILLIE FRANKLIN, WILLIE LEWIS, CALEDONIA JACKSON, SHIRLEY JERNIGAN, EVELYN NELSON, WILLIE LAWRENCE, MAMIE MITCHELL, BETTY PERSON, DIANE PETERSON, GWEN ROGERS, WILLIAM SCREWS, ERNESTINE STARKS, GERALD STOKES, ALBERT THOMAS, CHARLES THOMAS, KENNETH WILLIAMS, EARLINE YOUNG

Plaintiffs,

5.

H & R BLOCK, INC.
BENEFICIAL NATIONAL BANK
BENEFICIAL TAX MASTERS, INC.

Defendants.

NOTICE OF TAKING DEPOSITION
AND REQUEST FOR PRODUCTION

TO: BENEFICIAL NATIONAL BANK
c/o Household International, Inc.
2700 Sanders Road
Prospect Heights, Illinois 60070

PLEASE TAKE NOTICE that pursuant to *Alabama Rules of Civil Procedure* 30(b)5 and 30(b)6 that Plaintiffs will take the deposition of Defendant before a court reporter or some other officer authorized by law to administer oaths, at a time

mutually agreed to by the parties at the offices of Jackson, Fraley & Shuttlesworth, P.C., 1740 Oxmoor Road, Suite E, Birmingham, Alabama 35209, beginning at 9:00 a.m., and shall continue or be resumed from time to time thereafter until the same has been completed.

Further note that pursuant to Rule 30(b)(6) said corporation "shall designate one or more officers directors, managing agents or other persons who consent to testify on its behalf ', and that the persons so designated shall testify as to matters known or reasonably available to said corporation as further identified in the request for documents contained hereinafter.

The deponent is requested to bring the following documents to the deposition and produce a copy of same ten (10) days prior to said deposition:

1. Produce a complete copy of each Plaintiffs loan account, tax files, computerized tax refund information, documents identifying each named Plaintiffs loan repayment and applications.

2. Produce any and all communication, of whatsoever nature, between this Defendant and each named Plaintiff.

3. Produce all documents that concern determination of annual percentage rates, and/or determination of interest rates and fees for refund anticipation loans.

4. Produce any and all documents, memoranda, correspondence and/or communication between H&R Block, Inc and Beneficial National Bank.

5. Produce any and all documents, memoranda, correspondence and/or communication between Beneficial National Bank and Beneficial Tax Masters, Inc.

6. Produce any and all documents, memoranda, correspondence and/or communication between Beneficial National Bank and the Internal Revenue Service that identifies and/or relates to any named Plaintiff.

7. Produce any and all documents, memoranda, correspondence and/or communication between Beneficial National Bank. and the Internal Revenue Service that identifies and/or relates to refund anticipation loan and/or the RAL program.

/s/ Stephen Jackson
Stephen Jackson - JAC034
Jeff S. Daniel - DAN034
JACKSON, FRALEY &
SHUTTLESWORTH, P.C.
1740 Oxmoor Road
Suite E
Birmingham, Alabama 35209
Telephone: (205) 870-9797

DEPOSITION NOTICE SERVED WITH ORIGINAL SUMMONS AND COMPLAINT.

IN THE CIRCUIT COURT OF
BARBOUR COUNTY, ALABAMA
CLAYTON DIVISION

[Filed _____]

CIVIL ACTION
NO. CV-2000-088

MARIE ANDERSON, ALVESTER BRAFORT, WALTER BRUTLEY, PATRICIA COLEMAN, TALAYA COPE, AUDREY DARBY, ANNIE DAVIS, APRIL DELOACH, DIANE FRANKLIN, LILLIE FRANKLIN, WILLIE LEWIS, CALEDONIA JACKSON, SHIRLEY JERNIGAN, EVELYN NELSON, WILLIE LAWRENCE, MAMIE MITCHELL, BETTY PERSON, DIANE PETERSON, GWEN ROGERS, WILLIAM SCREWS, ERNESTINE STARKS, GERALD STOKES, ALBERT THOMAS, CHARLES THOMAS, KENNETH WILLIAMS, EARLINE YOUNG

Plaintiffs,

5.

H & R BLOCK, INC.
BENEFICIAL NATIONAL BANK
BENEFICIAL TAX MASTERS, INC.

Defendants.

NOTICE OF TAKING DEPOSITION
AND REQUEST FOR PRODUCTION

TO: H&R BLOCK, INC.
4400 Main Street
Kansas City, Missouri 64111

PLEASE TAKE NOTICE that pursuant to *Alabama Rules of Civil Procedure* 30(b)5 and 30(b) that Plaintiffs will take the deposition of Defendant before a court reporter or some other officer authorized by law to administer oaths, at a time

mutually agreed to by the parties at the offices of Jackson, Fraley & Shuttlesworth, P.C.,1740 Oxmoor Road, Suite E, Birmingham, Alabama 35209, beginning at 9:00 a.m., and shall continue or be resumed from time to time thereafter until the same has been completed.

Further note that pursuant to Rule 30(b)(6) said corporation "shall designate one or more officers directors, managing agents or other persons who consent to testify on its behalf', and that the persons so designated shall testify as to matters known or reasonably available to said corporation as further identified in the request for documents contained hereinafter.

The deponent is requested to bring the following documents to the deposition and produce a copy of same ten (10) days prior to said deposition:

1. Produce a complete copy of the Plaintiffs tax files, computerized tax refund information, documents identifying each named Plaintiffs loan repayment and applications.

2. Produce any and all communication, of whatsoever nature, between this Defendant and each named Plaintiff.

3. Produce all documents that concern determination of annual percentage rates, and/or determination of interest rates and fees for refund anticipation loans.

4. Produce any and all documents, memoranda, correspondence and/or communication between H&R Block, Inc and Beneficial National Bank.

5. Produce any and all documents, memoranda, correspondence and/or communication between H&R.Block, Inc and Beneficial Tax Masters, Inc.

6. Produce any and all documents, memoranda, correspondence and/or communication between H&R Block, Inc and the Internal Revenue Service that identifies and/or relates to any named Plaintiff.

7. Produce any and all documents, memoranda, correspondence and/or communication between H&R Block, Inc and the Internal Revenue Service that identifies and/or relates to refund anticipation loan and/or the RAL program.

/s/ K. Stephen Jackson
K. Stephen Jackson - JAC034
Jeff S. Daniel - DAN034
JACKSON, FRALEY &
SHUTTLESWORTH, P.C.
1740 Oxmoor Road
Suite E
Birmingham, Alabama 35209
Telephone: (205) 870-9797

DEPOSITION NOTICE SERVED WITH ORIGINAL SUMMONS AND COMPLAINT

IN THE CIRCUIT COURT OF
BARBOUR COUNTY, ALABAMA
CLAYTON DIVISION

[Filed _____]

CIVIL ACTION
NO. CV-2000-088

MARIE ANDERSON, ALVESTER BRAFORT, WALTER BRUTLEY, PATRICIA COLEMAN, TALAYA COPE, AUDREY DARBY, ANNIE DAVIS, APRIL DELOACH, DIANE FRANKLIN, LILLIE FRANKLIN, WILLIE LEWIS, CALEDONIA JACKSON, SHIRLEY JERNIGAN, EVELYN NELSON, WILLIE LAWRENCE, MAMIE MITCHELL, BETTY PERSON, DIANE PETERSON, GWEN ROGERS, WILLIAM SCREWS, ERNESTINE STARKS, GERALD STOKES, ALBERT THOMAS, CHARLES THOMAS, KENNETH WILLIAMS, EARLINE YOUNG
Plaintiffs,

5.

H & R BLOCK, INC.
BENEFICIAL NATIONAL BANK
BENEFICIAL TAX MASTERS, INC.
Defendants.

NOTICE OF TAKING DEPOSITION
AND REQUEST FOR PRODUCTION

T0: BENEFICIAL NATIONAL BANK
c/o Household International, Inc.
2700 Sanders Road
Prospect Heights, Illinois 60070

PLEASE TAKE NOTICE that pursuant to *Alabama Rules of Civil Procedure 30(b)5* and 30(b)6 that Plaintiffs will take the deposition of Defendant before a court reporter or some other officer authorized by law to administer oaths, at a time

mutually agreed to by the parties at the offices of Jackson, Fraley & Shuttlesworth, P.C.,1740 Oxmoor Road, Suite E, Birmingham, Alabama 35209, beginning at 9:00 a.m., and shall continue or be resumed from time to time thereafter until the same has been completed.

Further note that pursuant to Rule 30(b)(6) said corporation "shall designate one or more officers directors, managing agents or other persons who consent to testify on its behalf", and that the persons so designated shall testify as to matters known or reasonably available to said corporation as further identified in the request for documents contained hereinafter.

The deponent is requested to bring the following documents to the deposition and produce a copy of same ten (10) days prior to said deposition:

1. Produce a complete copy of each Plaintiffs loan account, tax files, computerized tax refund information, documents identifying each named Plaintiffs loan repayment and applications.

2. Produce any and all communication, of whatsoever nature, between this Defendant and each named Plaintiff.

3. Produce all documents that concern determination of annual percentage rates, and/or determination of interest rates and fees for refund anticipation loans.

4. Produce any and all documents, memoranda, correspondence and/or communication between H&R Block, Inc and Beneficial National Bank.

5. Produce any and all documents, memoranda, correspondence and/or communication between Beneficial National Bank and Beneficial Tax Masters, Inc.

6. Produce any and all documents, memoranda, correspondence and/or communication between Beneficial National Bank and the Internal Revenue Service that identifies and/or relates to any named Plaintiff.

7. Produce any and all documents, memoranda, correspondence and/or communication between Beneficial National Bank. and the Internal Revenue Service that identifies and/or relates to refund anticipation loan and/or the RAL program.

/s/ K. Stephen Jackson
K. Stephen Jackson - JAC034
Jeff S. Daniel - DAN034
JACKSON, FRALEY &
SHUTTLESWORTH, P.C.
1740 Oxmoor Road
Suite E
Birmingham, Alabama 35209
Telephone: (205) 870-9797

DEPOSITION NOTICE SERVED WITH ORIGINAL SUMMONS AND COMPLAINT.

IN THE CIRCUIT COURT OF
BARBOUR COUNTY, ALABAMA
CLAYTON DIVISION

[Filed _____]

CIVIL ACTION
NO. CV-2000-088

MARIE ANDERSON, ALVESTER BRAFORT, WALTER BRUTLEY, PATRICIA COLEMAN, TALAYA COPE, AUDREY DARBY, ANNIE DAVIS, APRIL DELOACH, DIANE FRANKLIN, LILLIE FRANKLIN, WILLIE LEWIS, CALEDONIA JACKSON, SHIRLEY JERNIGAN, EVELYN NELSON, WILLIE LAWRENCE, MAMIE MITCHELL, BETTY PERSON, DIANE PETERSON, GWEN ROGERS, WILLIAM SCREWS, ERNESTINE STARKS, GERALD STOKES, ALBERT THOMAS, CHARLES THOMAS, KENNETH WILLIAMS, EARLINE YOUNG

Plaintiffs,

v.

H & R BLOCK, INC.
BENEFICIAL NATIONAL BANK
BENEFICIAL TAX MASTERS, INC.

Defendants.

PLAINTIFFS' FIRST CONSOLIDATED DISCOVERY REQUEST TO DEFENDANT H&R BLOCK, INC.

COME NOW the Plaintiffs pursuant to Alabama Rule of Civil Procedure 34, and hereby propound to the Defendant, H&R Block, Inc. (hereinafter referred to as "H&R Block"), the following Interrogatories and Requests for Production, responses to which are due within thirty days after service.

(A) These discovery requests are continuing in character so as to require you to file supplementary answers if you obtain additional or different information before trial.

(B) You are requested to produce the original of each document together with all nonidentical copies and drafts of that document. If the original of any document cannot be located, a copy (identified as a copy) shall be provided in lieu thereof, and shall be legible and bound or stapled in the same manner as the original.

(C) Documents shall be produced as they are kept in the regular course of business. All documents shall be produced in the filed folder, envelope or other container in which the documents are kept or maintained..

(D) If after conducting a reasonable investigation you cannot respond to a Request, you should so state and answer to the extent that you can, stating what information you do have, what information you cannot provide and stating the efforts to locate and obtain the unknown information.

DEFINITIONS

For the purpose of these Requests for Production and as used herein, the following words shall have, and be construed with reference to, the following meanings and definitions:

(1) "Identify" when used in reference to a natural person shall mean to state his or her full name and current, last known, resident address, current employer, and current business address; when used with respect to a document (as hereinafter defined) "identify" means to state the date, subject or substance, author, all recipients, type of document (e.g., letter, telegram, memorandum, computer printout, sound reproduction, chart, etc.), its present location, and the identity of each of its current custodians, and shall include documents (a) with respect to which a privilege it is, or may be, claimed and (b) documents which have been destroyed, lost, misplaced or damaged.

(2) "Document" and "documents" shall mean all documents subject to discovery under the Alabama Rules of Civil Procedure, and shall include, without limitation, every original and non-identical copy of each and every paper, document (including blind copies), letter, telegram, teletype, telex, telecopy, facsimile transmission, drawing, picture, photograph, negative, slide, movie, film, visual or audio transcription or record, memorandum, sketch, chart, report, note (including, but not limited to, notes used to prepare any letter, memorandum, report, or other document as herein defined), contract, agreement, change order, form, work sheet, memorandum or tape recording of telephone conversation or other conversation, witness (including, but not limited to, potential witness) interview, sound recording, sound recording transcription, engineering study, cross-section, plan, expert analysis, diary, journal, ledger, work memorandum, report of investigation and/or inspection, file memorandum, brochure, book, microfilm, tape, video tape, magnetic storage medium, exhibit, attachment, draft, certificate, chart, table, testimony, transcript of testimony, affidavit, printed or readable material, and any and all other means of storage and/or transmission of human intelligence.

(3) "Correspondence" shall mean any document carried by the United States Mail, the United States Postal Service, any private courier or courier service, facsimile, or transferred or transmitted in any manner whatsoever.

(4) "You" or "your" shall mean H&R Block, Inc. and any named Defendant, any fictitious Defendant and/or it's affiliates, subsidiaries, it's present or future officers, directors, agents, employees, and any other persons acting or purporting to act for or on it's or it's parents', affiliates' or subsidiaries' behalf.

(5) "Person" or "individual" includes individuals, corporations, firms, sole proprietorships, partnerships, associations, trusts, and governmental agencies, bodies and officials.

(6) "Facts" include, but are not limited to, events, transactions, and occurrences, the location of such events, transactions, or occurrences, all of which concern (as herein defined), or are concerned with, in any way whatsoever, directly or indirectly, the interrogatory subject.

(7) "Incident" shall mean the facts and circumstances giving rise to the claims made the basis of this lawsuit.

(8) "Application(s)" shall mean those loan applications executed by Plaintiff.

(9) "Plaintiff' shall mean any named Plaintiff.

(10) "Defendant" shall mean any named defendant and shall include but not be limited to any company that has been purchased, acquired, merged with or controlled by H&R Block, Inc. or a subsidiary or parent company of H&R Block, Inc..

(11) "RAL" shall mean refund anticipation loan, or other loan product marketed and/or sold by the Defendants.

(12) Unless otherwise stated, these requests seek documents concerning the time period from 1987 to the present (the "relevant time period"). The documents to be produced include all documents prepared, dated, sent and/or received during the relevant time period.

INTERROGATORIES

1. Please state the. name, date of birth, social security number, present business address, present employer and telephone number of each person who provided any information of whatever nature or description, relating to any of your answers to these interrogatories and request for production, and specify as to each person what interrogatories that person provided information for?

2. State the Defendant's correct legal name (i.e. the name in which it can sue or be sued).

3. State the name and address of each principal insurer of the Defendant who insured or reinsured the Defendant against risks or losses for the claims made the basis of this lawsuit, including any excess or umbrella carriers.

4. State whether the Defendant, its attorneys or any agents of the Defendant or its attorneys has secured, obtained or has any knowledge of any statement or account made by any person, including parties, whether written, recorded or oral, which pertain in any way to the occurrence made the basis of this lawsuit or any class action relating to tax refund loans and/or RAL loans. If so, state separately and severally the name and address of each person from whom a statement was obtained, the date the statement was obtained, and the person or either who has custody of said statement(s).

5. Identify all individuals to whom the Defendant has sold RAL loans from 1990 to the present day. Your response may be limited to claims for loans that were sold in the following Alabama Counties: Barbour, Bullock, Macon, Henry, Pike, Crenshaw, Butler, Montgomery Lowndes and Dallas.

6. Identify the name, last known address and title of each employee, agent or subcontractor that calculated, analyzed, determined and/or performed interest rate calculations and/or functions for the RAL program.

7. Do you contend any person or entity other than you is, or may be, responsible in whole or part for the claims asserted against you in this lawsuit? If so, state the full name and address of each such person or entity, the legal basis for your contention, the facts or evidence upon which your contention is based, and whether or not you have notified each such person or entity of your contention.

8. List the name, last known address and telephone number of all persons who may have knowledge of the incidents described in the Complaint. Please state whether said person is currently employed by the Defendant, each person's title and the issues of which each identified person has knowledge.

9. List the name, last known address and telephone number of all persons who have been employed by H&R Block between 1990 and the present date. State whether said person is currently employed by the Defendant, each person's title and the dates of employment. Your response may be limited to claims for loans that were sold in the following Alabama Counties: Barbour, Bullock, Macon, Henry, Pike, Crenshaw, Butler, Montgomery Lowndes and Dallas.

10. Does the Defendant maintain a department, employee, or subcontractor responsible for reviewing, auditing or investigating interest collections and/or loan profitability? If so, state the name(s), title(s), employer and location of employment for said person(s).

11. List the name and address of each and every expert witness you plan to call at the trial of this case. State the following:

(a) his or her qualifications as an expert;

(b) the subject matter on which he or she is expected to testify;

(c) the expert witnesses' expected testimony.

12. If you contend that any of the documents requested herein below are privileged, provide the following information:

(a) Identify the document by the date it bears, or if none, the date it was written;

(b) Identify the document by the name and address of each person who wrote it or participated in the writing of it, by the name and address of each person to whom it was addressed, each person to whom a copy was identified as being directed and by the name and address of each person who received a copy of the document;

(c) Identify the document by the description of the document, as for instance, a "letter" or a "memorandum";

(d) Indicate the document's present location or custodian; or, if unknown, its last known location or custodian or indicate the location and custodian of any copies;

(e) Indicate the reason the document was not produced, i.e, attorney-client privilege, work-product privilege, etc.

13. If any of the documents requested herein below or any of the information requested above are not within your possession, custody or control at the time your responses to these discovery requests are due, please list;

(a) the last known location of the documents or information;

(b) the identity of any person or entity having information about the location of the requested documents and information.

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Produce a complete copy of each Plaintiffs loan account, tax files, computerized tax refund information, documents identifying each named Plaintiffs loan repayment and applications.

2. Produce any and all communication, of whatsoever nature, between this Defendant and each named Plaintiff.

3. Produce all documents that concern determination of annual percentage rates, and/or determination of interest rates and fees for refund anticipation loans.

4. Produce any and all documents, memoranda, correspondence and/or communication between H&R Block, Inc and Beneficial National Bank.

5. Produce any and all documents, memoranda, correspondence and/or communication between Beneficial National Bank and Beneficial Tax Masters, Inc.

6. Produce any and all documents, memoranda, correspondence and/or communication between Beneficial National Bank and the Internal Revenue Service that identifies and/or relates to any named Plaintiff.

7. Produce any and all documents, memoranda correspondence and/or communication between Beneficial National Bank. and the Internal Revenue Service that identifies and/or relates to refund anticipation loan and/or the RAL program.

8. Produce all documents which identify and/or explain the establishment, location and access to the Defendants' archives or records storage.

9. Produce all documents, correspondence, memoranda, manuals and/or guides that relate to, identify and/or discuss loan applications and/or credit approval for refund anticipation loans.

10. Produce all documents, correspondence, memoranda, manuals and/or guides that relate to, identify and/or discuss

electronic fund transfers and/or funds received from the Internal Revenue Service.

11. Produce all documents, letters and memoranda regarding Defendants calculation, policy, plan, procedure, design and/or method of determining the finance charge for refund anticipation loans.

12. Produce all documents attached as exhibits to the depositions of any individual who was deposed in the case styled *Zawikowski v. Beneficial National Bank, et al.*, No. 98 C 2178 United Stats District Court, Northern District of Illinois.

13. Please produce copies of H&R Block's annual reports, balance sheet and statement of cash flows or other reports of H&R Block's financial condition for the past ten (10) years.

14. Please produce copies of the resume and/or curriculum vitae of each expert witness you expect to testify at trial and all reports received from each expert.

/s/ Stephen Jackson

Stephen Jackson - JAC034
Jeff S. Daniel - DAN034
JACKSON, FRALEY & SHUTTLESWORTH, P.C.
1740 Oxmoor Road
Suite E
Birmingham, Alabama 35209
Telephone: (205) 870-9797

Walter B. Calton
John Hagood
CALTON, RUTLAND & HAGOOD, L.L.C.
312 East Broad Street
Post Office Box 696
Eufaula, Alabama 36027

DISCOVERY REQUESTS SERVED WITH ORIGINAL SUMMONS AND COMPLAINT

IN THE CIRCUIT COURT OF
BARBOUR COUNTY, ALABAMA
CLAYTON DIVISION

[Filed _____]

CIVIL ACTION
NO. CV-2000-088

MARIE ANDERSON, ALVESTER BRAFORT, WALTER BRUTLEY, PATRICIA COLEMAN, TALAYA COPE, AUDREY DARBY, ANNIE DAVIS, APRIL DELOACH, DIANE FRANKLIN, LILLIE FRANKLIN, WILLIE LEWIS, CALEDONIA JACKSON, SHIRLEY JERNIGAN, EVELYN NELSON, WILLIE LAWRENCE, MAMIE MITCHELL, BETTY PERSON, DIANE PETERSON, GWEN ROGERS, WILLIAM SCREWS, ERNESTINE STARKS, GERALD STOKES, ALBERT THOMAS, CHARLES THOMAS, KENNETH WILLIAMS, EARLINE YOUNG

Plaintiffs,

v.

H & R BLOCK, INC.
BENEFICIAL NATIONAL BANK
BENEFICIAL TAX MASTERS, INC.

Defendants.

PLAINTIFFS' FIRST CONSOLIDATED DISCOVERY REQUEST TO DEFENDANT BENEFICIAL NATIONAL BANK

COME NOW the Plaintiffs pursuant to Alabama Rule of Civil Procedure 34, and hereby propound to the Defendant, Beneficial National Bank (hereinafter referred to as `Beneficial"), the following Interrogatories and Requests for Production, responses to which are due within thirty days after service.

(A) These discovery requests are continuing in character so as to require you to file supplementary answers if you obtain additional or different information before trial.

(B) You are requested to produce the original of each document together with all nonidentical copies and drafts of that document. If the original of any document cannot be located, a copy (identified as a copy) shall be provided in lieu thereof, and shall be legible and bound or stapled in the same manner as the original.

(C) Documents shall be produced as they are kept in the regular course of business. All documents shall be produced in the filed folder, envelope or other container in which the documents are kept or maintained..

(D) If after conducting a reasonable investigation you cannot respond to a Request, you should so state and answer to the extent that you can, stating what information you do have, what information you cannot provide and stating the efforts to locate and obtain the unknown information.

DEFINITIONS

For the purpose of these Requests for Production and as used herein, the following words shall have, and be construed with reference to, the following meanings and definitions:

(1) "Identify" when used in reference to a natural person shall mean to state his or her full name and current, last known, resident address, current employer, and current business address; when used with respect to a document (as hereinafter defined) "identify" means to state the date, subject or substance, author, all recipients, type of document (e.g., letter, telegram, memorandum, computer printout, sound reproduction, chart, etc.), its present location, and the identity of each of its current custodians, and shall include documents (a) with respect to which a privilege it is, or may be, claimed

and (b) documents which have been destroyed, lost, misplaced or damaged.

(2) "Document" and "documents" shall mean all documents subject to discovery under the Alabama Rules of Civil Procedure, and shall include, without limitation, every original and non-identical copy of each and every paper, document (including blind copies), letter, telegram, teletype, telex, telecopy, facsimile transmission, drawing, picture, photograph, negative, slide, movie, film, visual or audio transcription or record, memorandum, sketch, chart, report, note (including, but not limited to, notes used to prepare any letter, memorandum, report, or other document as herein defined), contract, agreement, change order, form, work sheet, memorandum or tape recording of telephone conversation or other conversation, witness (including, but not limited to, potential witness) interview, sound recording, sound recording transcription, engineering study, cross-section, plan, expert analysis, diary, journal, ledger, work memorandum, report of investigation and/or inspection, file memorandum, brochure, book, microfilm, tape, video tape, magnetic storage medium, exhibit, attachment, draft, certificate, chart, table, testimony, transcript of testimony, affidavit, printed or readable material, and any and all other means of storage and/or transmission of human intelligence.

(3) "Correspondence" shall mean any document carried by the United States Mail, the United States Postal Service, any private courier or courier service, facsimile, or transferred or transmitted in any manner whatsoever.

(4) "You" or "your" shall mean Beneficial National Bank and any named Defendant, any fictitious Defendant and/or it's affiliates, subsidiaries, it's present or future officers, directors, agents, employees, and any other persons acting or purporting to act for or on it's or it's parents', affiliates' or subsidiaries' behalf.

(5) "Person" or "individual" includes individuals, corporations, firms, sole proprietorships, partnerships, associations, trusts, and governmental agencies, bodies and officials.

(6) "Facts" include, but are not limited to, events, transactions, and occurrences, the location of such events, transactions, or occurrences, all of which concern (as herein defined), or are concerned with, in any way whatsoever, directly or indirectly, the interrogatory subject.

(7) "Incident" shall mean the facts and circumstances giving rise to the claims made the basis of this lawsuit.

(8) "Application(s)" shall mean those loan applications executed by Plaintiff.

(9) "Plaintiff" shall mean any named Plaintiff.

(10) "Defendant" shall mean any named defendant and shall include but not be limited to any company that has been purchased, acquired, merged with or controlled by Beneficial National Bank or a subsidiary or parent company of Beneficial National Bank. This Definition expressly includes any subsidiary or parent company of Household International, Inc, and/or Household Finance Corporation.

(11) "RAL" shall mean refund anticipation loan, or other loan product marketed and/or sold by the Defendants.

(12) Unless otherwise stated, these requests seek documents concerning the time period from 1987 to the present (the "relevant time period"). The documents to be produced include all documents prepared, dated, sent and/or received during the relevant time period.

INTERROGATORIES

1. Please state the name, date of birth, social security number, present business address, present employer and telephone number of each person who provided any information of whatever nature or description, relating to any of your answers to these interrogatories and request for production, and specify as to each person what interrogatories that person provided information for?

2. State the Defendant's correct legal name (i.e. the name in which it can sue or be sued).

3. State the name and address of each principal insurer of the Defendant who insured or reinsured the Defendant against risks or losses for the claims made the basis of this lawsuit, including any excess or umbrella carriers.

4. State whether the Defendant, its attorneys or any agents of the Defendant or its attorneys has secured, obtained or has any knowledge of any statement or account made by any person, including parties, whether written, recorded or oral, which pertain in any way to the occurrence made the basis of this lawsuit or any class action relating to tax refund loans and/or RAL loans. If so, state separately and severally the name and address of each person from whom a statement was obtained, the date the statement was obtained, and the person or either who has custody of said statement(s).

5. Identify all individuals to whom the Defendant has sold RAL loans from 1990 to the present day. Your response may be limited to claims for loans that were sold in the following Alabama Counties; Barbour, Bullock, Macon, Henry, Pike, Crenshaw, Butler, Montgomery Lowndes and Dallas.

6. Identify the name, last known address and title of each employee, agent or subcontractor that calculated, analyzed,

determined and/or performed interest rate calculations and/or functions for the RAL product.

7. Do you contend any person or entity other than you is, or may be, responsible in whole or part for the claims asserted against you in this lawsuit? If so, state the full name and address of each such person or entity, the legal basis for your contention, the facts or evidence upon which your contention is based, and whether or not you have notified each such person or entity of your contention.

8. List the name, last known address and telephone number of all persons who may have knowledge of the incidents described in the Complaint. Please state whether said person is currently employed by the Defendant, each person's title and the issues of which each identified person has knowledge.

9. List the name, last known address and telephone number of all persons who have been employed by H&R Block between 1990 and the present date. State whether said person is currently employed by the Defendant, each person's title and the dates of employment. Your response may be limited to claims for loans that were sold in the following Alabama Counties: Barbour, Bullock, Macon, Henry, Pike, Crenshaw, Butler, Montgomery Lowndes and Dallas.

10. Does the Defendant maintain a department, employee, or subcontractor responsible for reviewing, auditing or investigating interest collections and/or loan profitability? If so, state the name(s), title(s), employer and location of employment for said person(s).

11. List the name and address of each and every expert witness you plan to call at the trial of this case. State the following:

(a) his or her qualifications as an expert;

(b) the subject matter on which he or she is expected to testify;

(c) the expert witnesses' expected testimony.

12. If you contend that any of the documents requested herein below are privileged, provide the following information:

(a) Identify the document by the date it bears, or if none, the date it was written;

(b) Identify the document by the name and address of each person who wrote it or participated in the writing of it, by the name and address of each person to whom it was addressed, each person to whom a copy was identified as being directed and by the name and address of each person who received a copy of the document;

(c) Identify the document by the description of the document, as for instance, a "letter" or a "memorandum";

(d) Indicate the document's present location or custodian; or, if unknown, its last known location or custodian or indicate the location and custodian of any copies;

(e) Indicate the reason the document was not produced, i.e, attorney-client privilege, work-product privilege, etc.

13. If any of the documents requested herein below or any of the information requested above are not within your possession, custody or control at the time your responses to these discovery requests are due, please list;

(a) the last known location of the documents or information;

(b) the identity of any person or entity having information about the location of the requested documents and information.

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Produce a complete copy of each Plaintiffs loan account, tax files, computerized tax refund information, documents identifying each named Plaintiffs loan repayment and applications.

2. Produce any and all communication, of whatsoever nature, between this Defendant and each named Plaintiff.

3. Produce all documents that concern determination of annual percentage rates, and/or determination of interest rates and fees for refund anticipation loans.

4. Produce any and all documents, memoranda, correspondence and/or communication between H&R Block, Inc and Beneficial National Bank.

5. Produce any and all documents, memoranda, correspondence and/or communication between Beneficial National Bank and Beneficial Tax Masters, Inc.

6. Produce any and all documents, memoranda, correspondence and/or communication between Beneficial National Bank and the Internal Revenue Service that identifies and/or relates to any named Plaintiff.

7. Produce any and all documents, memoranda, correspondence and/or communication between Beneficial National Bank. and the Internal Revenue Service that identifies and/or relates to refund anticipation loan and/or the RAL program.

8. Produce all documents which identify and/or explain the establishment, location and access to the Defendants' archives or records storage.

9. Produce all documents, correspondence, memoranda, manuals and/or guides that relate to, identify and/or discuss loan applications and/or credit approval for refund anticipation loans.

10. Produce all documents, correspondence, memoranda, manuals and/or guides that relate to, identify and/or discuss

electronic fund transfers and/or funds received from the Internal Revenue Service.

11. Produce all documents, letters and memoranda regarding Defendants calculation, policy, plan, procedure, design and/or method of determining the finance charge for refund anticipation loans.

12. Produce all documents attached as exhibits to the depositions of any individual who was deposed in the case styled *Zawikowski v. Beneficial National Bank, et al.,* No. 98 C 2178 United Stats District Court, Northern District of Illinois.

13. Please produce copies of Beneficial's annual reports, balance sheet and statement of cash flows or other reports of Beneficial's financial condition for the past ten (10) years.

14. Please produce copies of the resume and/or curriculum vitae of each expert witness you expect to testify at trial and all reports received from each expert.

/s/ Stephen Jackson
Stephen Jackson - JAC034
Jeff S. Daniel - DAN034
JACKSON, FRALEY & SHUTTLESWORTH, P.C.
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Telephone: (205) 870-9797

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312 East Broad Street
Post Office Box 696
Eufaula, Alabama 36027

DISCOVERY REQUESTS SERVED WITH ORIGINAL SUMMONS AND COMPLAINT

IN THE CIRCUIT COURT OF
BARBOUR COUNTY, ALABAMA
CLAYTON DIVISION

[Filed _____]

CIVIL ACTION
NO. CV-2000-088

MARIE ANDERSON, ALVESTER BRAFORT, WALTER BRUTLEY, PATRICIA COLEMAN, TALAYA COPE, AUDREY DARBY, ANNIE DAVIS, APRIL DELOACH, DIANE FRANKLIN, LILLIE FRANKLIN, WILLIE LEWIS, CALEDONIA JACKSON, SHIRLEY JERNIGAN, EVELYN NELSON, WILLIE LAWRENCE, MAMIE MITCHELL, BETTY PERSON, DIANE PETERSON, GWEN ROGERS, WILLIAM SCREWS, ERNESTINE STARKS, GERALD STOKES, ALBERT THOMAS, CHARLES THOMAS, KENNETH WILLIAMS, EARLINE YOUNG

Plaintiffs,

v.

H & R BLOCK, INC.
BENEFICIAL NATIONAL BANK
BENEFICIAL TAX MASTERS, INC.

Defendants.

SUMMONS

This service by Certified Mail of this Summons is initiated upon the written request of Plaintiffs' attorney pursuant to the Alabama Rules of Civil Procedure.

NOTICE TO: H&R Block, Inc.
4400 Main Street
Kansas City, Missouri 64111

The Complaint which is attached to thus Summons is important and you must take immediate action to protect your rights. You are required to mail or hand-deliver a copy of a written Answer, either admitting or denying each allegation in the Complaint, to K. Stephen Jackson, the lawyer for the Plaintiff, whose address is: Jackson, Fraley & Shuttlesworth, 1740 Oxmoor Rd., Suite E, Birmingham, Alabama 35209. THIS ANSWERNNST BE FILED OR DELIVERED WITHIN THIRTY (30) DAYS AFTER THIS SUMMONS AND COMPLAINT WERE DELIVERED TO YOU OR A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY OR OTHER THINGS DEMANDED IN THE COMPLAINT. You must also file the original of your Answer with the Clerk of this Court within a reasonable time afterward.

/s/ David S. Nix
Clerk of Court

Dated: 9-19-2000

IN THE CIRCUIT COURT OF
BARBOUR COUNTY, ALABAMA
CLAYTON DIVISION

[Filed _____]

CIVIL ACTION
NO. CV-2000-088

MARIE ANDERSON, ALVESTER BRAFORT, WALTER BRUTLEY, PATRICIA COLEMAN, TALAYA COPE, AUDREY DARBY, ANNIE DAVIS, APRIL DELOACH, DIANE FRANKLIN, LILLIE FRANKLIN, WILLIE LEWIS, CALEDONIA JACKSON, SHIRLEY JERNIGAN, EVELYN NELSON, WILLIE LAWRENCE, MAMIE MITCHELL, BETTY PERSON, DIANE PETERSON, GWEN ROGERS, WILLIAM SCREWS, ERNESTINE STARKS, GERALD STOKES, ALBERT THOMAS, CHARLES THOMAS, KENNETH WILLIAMS, EARLINE YOUNG

Plaintiffs,

v.

H & R BLOCK, INC.
BENEFICIAL NATIONAL BANK
BENEFICIAL TAX MASTERS, INC.

Defendants.

SUMMONS

This service by Certified Mail of this Summons is initiated upon the written request of Plaintiffs' attorney pursuant to the Alabama Rules of Civil Procedure.

NOTICE TO: Beneficial National Bank
c/o Household International, Inc.
2700 Sanders Road
Prospect Heights, Illinois 60070

The Complaint which is attached to this Summons is important and you must take immediate action to protect your rights. You are required to mail or hand-deliver a copy of a written Answer, either admitting or denying each allegation in the Complaint, to K. Stephen Jackson, the lawyer for the Plaintiff, whose address is: Jackson, Fraley & Shuttlesworth, 1740 Oxmoor Rd., Suite E, Birmingham, Alabama 35209. THIS ANSWER MUST BE FILED OR DELIVERED WITHIN THIRTY (30) DAYS AFTER THIS SUMMONS AND COMPLAINT WERE DELIVERED TO YOU OR A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY OR OTHER THINGS DEMANDED IN THE COMPLAINT. You must also file the original of your Answer with the Clerk of this Court within a reasonable time afterward.

/s/ David S. Nix
Clerk of Court

Dated: 9-19-2000

IN THE CIRCUIT COURT OF
BARBOUR COUNTY, ALABAMA
CLAYTON DIVISION

[Filed _____]

CIVIL ACTION
NO. CV-2000-088

MARIE ANDERSON, ALVESTER BRAFORT, WALTER BRUTLEY, PATRICIA COLEMAN, TALAYA COPE, AUDREY DARBY, ANNIE DAVIS, APRIL DELOACH, DIANE FRANKLIN, LILLIE FRANKLIN, WILLIE LEWIS, CALEDONIA JACKSON, SHIRLEY JERNIGAN, EVELYN NELSON, WILLIE LAWRENCE, MAMIE MITCHELL, BETTY PERSON, DIANE PETERSON, GWEN ROGERS, WILLIAM SCREWS, ERNESTINE STARKS, GERALD STOKES, ALBERT THOMAS, CHARLES THOMAS, KENNETH WILLIAMS, EARLINE YOUNG

Plaintiffs,

v.

H & R BLOCK, INC.
BENEFICIAL NATIONAL BANK
BENEFICIAL TAX MASTERS, INC.

Defendants.

SUMMONS

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c/o Household International, Inc.
2700 Sanders Road
Prospect Heights, Illinois 60070

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/s/ David S. Nix
Clerk of Court

Dated: 9-19-2000

[A copy of the Complaint follows in the original;
the Complaint is presented at the beginning of
this Joint Appendix.]

[A copy of the decision of the Middle District of Louisiana
in *Gallagher v. H&R Block Eastern Tax Services, Inc.*
follows in the original; that decision is presented
in the Petition, at 59a.]

[The decision of the Middle District of Alabama, *Anderson v. H&R Block, Inc.*, 132 F. Supp. 2d 948 (M.D. Ala. 2000), appears in the Petition, at 21a.]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Apr. 10, 2001]

No. 01-90003-F

MARIE ANDERSON, ALVESTER BRAFORT, WALTER BRUTLEY, PATRICIA COLEMAN, TALAYA COPE, AUDREY DARBY, ANNIE DAVIS, APRIL DELOACH, DIANE FRANKLIN, LILLIE FRANKLIN, WILLIE LEWIS, CALEDONIA JACKSON, SHIRLEY JERNIGAN, EVELYN NELSON, WILLIE LAWRENCE, MAMIE MITCHELL, BETTY PERSON, DIANE PETERSON, GWEN ROGERS, WILLIAM SCREWS, ERNESTINE STARKS, GERALD STOKES, ALBERT THOMAS, CHARLES THOMAS, KENNETH WILLIAMS, EARLINE YOUNG

Petitioners,

versus

H & R BLOCK, INC.
BENEFICIAL NATIONAL BANK
BENEFICIAL TAX MASTERS, INC.

Respondents.

Petition for Permission to Appeal an Order from
the United States District Court for the
Middle District of Alabama

BEFORE: BIRCH, BARKETT and MARCUS, Circuit Judges.

BY THE COURT:

The petition for permission to appeal pursuant to 28 U.S.C. §1292(b) is GRANTED.

[The decision of the Eleventh Circuit Court of Appeals that is under review, *Anderson v. H&R Block, Inc.*, 287 F.3d 1038 (11th Cir. 2002), appears in the Petition, at 1a.]

[The order of the Eleventh Circuit Court of Appeals denying the Petition for Rehearing En Banc appears in the Petition, at 29a.]

[The order of the Eleventh Circuit Court of Appeals granting a stay of the issuance of the mandate appears in the Petition, at 36a.]

No. 02-306

Supreme Court, U.S.
MAR 7 - '03
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BENEFICIAL NATIONAL BANK AND
BENEFICIAL TAX MASTERS, INC.,
Petitioners,

v.

MARIE ANDERSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONERS

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56pp

QUESTION PRESENTED

Whether a usury claim against a national bank, even if ostensibly brought under state law, necessarily arises under Section 30 of the National Bank Act, 12 U.S.C. §§ 85 and 86, so as to permit a federal court to exercise removal jurisdiction over the claim.

PARTIES TO THE PROCEEDING BELOW

Plaintiffs-Appellants:

Marie Anderson, Alvester Brafort, Walter Brutley, Patricia Coleman, Talaya Cope, Audrey Darby, Annie Davis, April DeLoach, Diane Franklin, Lillie Franklin, Willie Lewis, Caledonia Jackson, Shirley Jernigan, Evelyn Nelson, Willie Lawrence, Mamie Mitchell, Betty Person, Diane Peterson, Gwen Rogers, Williams Screws, Ernestine Starks, Gerald Stokes, Albert Thomas, Charles Thomas, Kenneth Williams, and Earline Young

Defendants-Appellees:

Beneficial National Bank, Beneficial Tax Masters, Inc., and H&R Block, Inc.

CORPORATE DISCLOSURE STATEMENT

As a result of a corporate merger in 1998, Beneficial National Bank was merged into Household Bank, f.s.b., and Beneficial Tax Masters, Inc., was renamed as Household Tax Masters, Inc. Household Bank, f.s.b., was dissolved in January 2003. Its remaining assets were sold to various entities. Assets relating to the tax-refund anticipation loan program at issue in this case were sold to Household Tax Masters, Inc. In addition, Household Finance Corporation has guaranteed any and all contingent obligations of Household Bank, f.s.b. Household International, Inc., is the parent corporation of Household Finance Corporation and Household Tax Masters, Inc., and is publicly traded.

In November 2002, Household International, Inc., agreed to merge into H2 Acquisition Corporation, which is a wholly owned subsidiary of HSBC Holdings plc. HSBC Holdings plc is publicly traded. The merger is expected to be completed in the first quarter of 2003, subject to regulatory approvals in various jurisdictions.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING BELOW ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 9

ARGUMENT 11

I. ANY USURY CLAIM AGAINST A NATIONAL BANK ARISES UNDER FEDERAL LAW, AND ONLY UNDER FEDERAL LAW 11

II. A PLAINTIFF CANNOT AVOID CONGRESS'S TOTAL SUPPLANTATION OF STATE LAW CLAIMS WITH FEDERAL LAW AND DEFEAT REMOVAL BY ARTFULLY PLEADING A NONEXISTENT STATE-LAW CLAIM 15

III. BECAUSE A USURY CLAIM AGAINST A NATIONAL BANK NECESSARILY ARISES UNDER FEDERAL LAW, IT MAY BE REMOVED TO FEDERAL COURT, NOTWITHSTANDING THE PLAINTIFF'S PURPORTED RELIANCE ONLY ON STATE LAW 21

TABLE OF CONTENTS—Continued

Page

A. A Claim That Necessarily Arises Under Federal Law Can Be Removed Without A Further Showing That Congress Specifically Intended For That Claim To Be Removable 21

B. Usury Claims Against National Banks Are Removable 28

C. The Court Of Appeals Erred In Requiring Evidence Of Specific Congressional Intent To Permit Removal Of Usury Claims 30

IV. RESPONDENTS' VARIOUS OTHER ARGUMENTS AGAINST REMOVAL ARE WITHOUT MERIT 33

CONCLUSION 37

APPENDIX: Statutory Provisions 1a

TABLE OF AUTHORITIES

CASES

Page(s)

Aaron v. *National Union Fire Insurance Co.*, 876 F.2d 1157 (5th Cir. 1989) 26

American Fire & Casualty Co. v. *Finn*, 341 U.S. 6 (1951) 34

Avco Corp. v. *Aero Lodge No. 735*, 390 U.S. 557 (1968) 8, 21, 22, 32

Barnet v. *Muncie National Bank*, 98 U.S. 555 (1878) 13

Barnett Bank v. *Nelson*, 517 U.S. 25 (1996) 35

Carter v. *Carusi*, 112 U.S. 478 (1884) 13

Caterpillar Inc. v. *Williams*, 482 U.S. 386 (1987) 6, 16, 27, 36

Charles Dowd Box Co. v. *Courtney*, 368 U.S. 502 (1962) 32

City of Chicago v. *International College of Surgeons*, 522 U.S. 156 (1997) 34

City of Galveston v. *International Organization of Masters, Mates & Pilots*, 338 F. Supp. 907 (S.D. Tex. 1972) 19

City of Indianapolis v. *Chase National Bank*, 314 U.S. 63 (1941) 18

Easton v. *Iowa*, 188 U.S. 220 (1903) 12

Evans v. *National Bank of Savannah*, 251 U.S. 108 (1919) 14

Ex Parte Nebraska, 209 U.S. 436 (1908) 18

Farmers' & Mechanics' National Bank v. *Dearing*, 91 U.S. (1 Otto) 29 (1875) 11, 12, 13

First National Bank of Charlotte v. *Morgan*, 132 U.S. 141 (1889) 13

Franchise Tax Board v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) 23, 24

TABLE OF AUTHORITIES—Continued

Page

Gulf Offshore Co. v. *Mobil Oil Corp.*, 453 U.S. 473 (1981) 32
Haseltine v. *Central National Bank*, 183 U.S. 132 (1901) 13
In re Prudential Sales Practices Litigation, 148 F.3d 283 (3d Cir. 1998) 34
Klussman v. *Cross-Country Bank*, No. C-01-4228-SC, 2002 WL 1000184 (N.D. Cal. May 15, 2002) 26
Krispin v. *May Department Stores*, 218 F.3d 919 (8th Cir. 2000) 34
Louisville & Nashville Railroad Co. v. *Mottley*, 211 U.S. 149 (1908) 16
M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 12
Marquette National Bank of Minneapolis v. *First of Omaha Service Corp.*, 439 U.S. 299 (1978) 4, 14, 15, 36
McCollum v. *Hamilton National Bank of Chattanooga*, 303 U.S. 245 (1938) 14
Metcalf v. *City of Watertown*, 128 U.S. 586 (1888) 8
Metropolitan Life Insurance Co. v. *Taylor*, 481 U.S. 107 (1987) 16, 24, 25, 26
New York v. *Local 1115 Joint Board*, 412 F. Supp. 720 (E.D.N.Y. 1976) 19
Rivet v. *Regions Bank of Louisiana*, 522 U.S. 470 (1998) 6, 16, 17, 20, 27
Rosciszewski v. *Arete Associates*, 1 F.3d 225 (4th Cir. 1993) 32
Skelly Oil Co. v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950) 16
Smiley v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996) ... 14, 29

TABLE OF AUTHORITIES—Continued

Page

Spellman v. *Meridian Bank (Del.)*, Nos. 94-3203, 94-3204, 94-3215 to 94-3218, 1995 WL 764548 (3d Cir. Dec. 29, 1995), *vacated & set for reh'g en banc*, 1996 U.S. App. LEXIS 2506 (3d Cir. Feb. 16, 1996) 12, 26
St. Paul Mercury Indemnity Co. v. *Red Cab Co.*, 303 U.S. 283 (1938) 18
Sylgab Steel & Wire Corp. v. *Strickland Transportation Co.*, 270 F. Supp. 264 (E.D.N.Y. 1967) 19
Tennessee v. *Union & Planters Bank*, 152 U.S. 454 (1894) 8
Textile Workers Union v. *Lincoln Mills*, 353 U.S. 448 (1957) 22
Thomson v. *Gaskill*, 315 U.S. 442 (1942) 18
Tiffany v. *National Bank of Missouri*, 85 U.S. 409 (1873) 12, 14, 15
Wecker v. *National Enameling & Stamping Co.*, 204 U.S. 176 (1907) 18
Wilson v. *Republic Iron & Steel Co.*, 257 U.S. 92 (1921) 18

STATUTES

12 U.S.C. § 85 ..... 4, 5, 36
12 U.S.C. § 86 4
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 ..... *passim*
28 U.S.C. § 1367(a) 34
28 U.S.C. § 1441 ..... *passim*
28 U.S.C. § 1445(a) 31
28 U.S.C. § 1446 ..... 2, 33
29 U.S.C. § 1132(f) 25
Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369 37
Judiciary Act of 1875, 18 Stat. 470 7

TABLE OF AUTHORITIES—Continued

Page

24 Stat. 552 (Mar. 3, 1887), as corrected, 25 Stat. 433 (Aug. 13, 1888) 7
Act of March 3, 1911, 36 Stat. 1087 37
Act of June 25, 1948, 62 Stat. 869 37
Alabama Code § 8-8-1 3

BOOKS AND TREATISES

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§ 102.21[5][a] 20
§§ 102.30—102.65 19
13B Wright, Charles Alan, Arthur R. Miler & Edward H. Cooper, *Federal Practice & Procedure* § 3607 (3d ed. 1998) 18

IN THE

Supreme Court of the United States

No. 02-306

BENEFICIAL NATIONAL BANK AND
BENEFICIAL TAX MASTERS, INC.,
Petitioners,

v.

MARIE ANDERSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a-20a) is reported at 287 F.3d 1038. The opinion of the United States District Court for the Middle District of Alabama (Pet. App. 21a-28a) is reported at 132 F. Supp. 2d 948.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2002. The court of appeals denied a petition for re-

hearing on May 29, 2002 (Pet. App. 29a).[1] The petition for a writ of certiorari was filed on August 26, 2002, and was granted on January 24, 2003. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Section 30 of the National Bank Act, 12 U.S.C. §§ 85, 86. It also involves 28 U.S.C. § 1331, § 1441, and § 1446(a) and (b). These statutes are set forth in the appendix to this brief.

STATEMENT OF THE CASE

1. At all times pertinent, petitioner Beneficial National Bank (the "Bank") was a national bank chartered under the National Bank Act ("NBA") and was subject to the supervision of the Office of the Comptroller of the Currency in the United States Department of the Treasury ("OCC" or "Comptroller"). The Bank made tax-refund anticipation loans to the respondents, who were tax-preparation customers of H&R Block, Inc. ("Block"). These are loans made by a bank in the amount of the borrower's anticipated tax refund less interest and fees, enabling the borrower to receive cash more quickly than waiting for the tax refund.

In September 2000, respondents brought suit in an Alabama state court, the Circuit Court of Barbour County, against petitioners, the Bank and its affiliate Beneficial Tax Masters, Inc., and also against Block,[2] alleging that the Bank had charged usurious interest on the tax-refund anticipation loans it had made to respondents. The plaintiffs (the respondents in this Court) were 26 citizens of Alabama, all resident in Barbour County. Although the Bank was sued

[1] On June 17, 2002, the court of appeals granted a stay of its mandate, pending the filing of the certiorari petition and this Court's disposition of the petition. Pet. App. 36a.

[2] Block has filed a separate petition for a writ of certiorari (No. 02-312). The Court has not acted on that petition.

under its name, which identifies it as a national bank, the complaint asserted usury claims based only on Alabama Code § 8-8-1 and the common law, and did not mention Section 30 of the National Bank Act. App. 18-30. Indeed, the complaint contained an express disavowal of any intent to assert a federal claim. ¶ 31, App. 23.

The complaint charged usury in the following Count IV:

> USURY VIOLATIONS
>
> 58. Plaintiffs reallege and incorporate by reference the foregoing paragraphs 1 through 57 and further aver[ ] as follows:
>
> 59. Defendants charged each Plaintiff excessive interest in violation of the common law usury doctrine.
>
> 60. Defendants have violated Alabama Code § 8-8-1, et seq. by charging excessive interest on the Plaintiffs' tax refund.
>
> 61. Defendants breached their statutory and common law duties described hereinabove, and Plaintiffs suffered damages as follows:
>
> (a) paying excessive interest and fees to the Defendants;
>
> (b) foregoing the use of their money; and
>
> (c) suffering mental anguish.
>
> 62. As a direct and proximate consequence of Defendant[']s actions, Plaintiffs have been injured and damaged as identified her[e]inabove.
>
> WHEREFORE, PREMISES CONSIDERED, Plaintiff[s] demand[] judgment against Defendants joint[ly] and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff, in an amount to be determined by a jury.

App. 28-29.

In addition to the "Usury Violations" alleged in Count IV, respondents also repeatedly alleged the charging of "excessive interest" in all the other counts. Paragraph 36 alleged that "[t]he interest charges were knowingly assessed by the Defendants and are in excess of the legal limit on interest rates allowed under Alabama statute and the common law doctrine of usury." That allegation is incorporated by reference in all other counts of the complaint. *Id.* ¶¶ 38, 43, 50, and 63; *see also id.* ¶¶ 41(a) ("excessive interest"), 46(a) ("excessive interest"), 53 ("excessive interest"), 56(a) ("excessive interest"), ¶ 67(a) ("excessive interest"); App. 24-29. These other counts included intentional misrepresentation, suppression of material facts, breach of fiduciary duty, and violations of the Alabama Code by charging "excessive interest." Each of these counts, like that quoted above, demanded compensatory and punitive damages "not to exceed $74,900 per named Plaintiff, in an amount to be determined by a jury."

2. Petitioners and Block timely removed the case to the United States District Court for the Middle District of Alabama, pursuant to 28 U.S.C. § 1441(a) and (b). App. 31-35. Jurisdiction was invoked under 28 U.S.C. § 1331 on the ground that the action necessarily arose under the laws of the United States. As the basis for removal, petitioners argued that any usury claim against a national bank must arise only under Section 30 of the National Bank Act, codified at 12 U.S.C. §§ 85-86, which provides that a national bank may charge interest "at the rate allowed by the laws of the State . . . where the bank is located,"[3] or "at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater . . . ." 12 U.S.C. § 85. Section 30 of the National Bank Act also provides that if the national bank commits usury, then the borrower may obtain a judgment declaring forfeiture of the interest on the debt (if not previously paid), or may recover twice the amount of any interest already paid. 12 U.S.C. § 86.

[3] The state where a national bank is "located" for this purpose is the state in which the headquarters specified in its certificate of organization is located. *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 308-13 (1978). In this case, the Bank's location so defined was in Delaware.

Respondents moved to remand the case to state court. The district court denied that motion. The district court agreed with petitioners that the claims alleging that the Bank had charged usurious interest necessarily arose under Section 30 of the National Bank Act and thus established jurisdiction under 28 U.S.C. § 1331 over a question "arising under" federal law, permitting removal. Pet. App. 28a. The district court certified that issue for interlocutory appeal. *Id.*

3. A divided panel of the United States Court of Appeals for the Eleventh Circuit reversed. Pet. App. 1a-20a. The majority concluded that removal was improper because, even though (as the court acknowledged) Section 30 of the National Bank Act exclusively "governs the amount of interest a national bank may charge" (*id.* at 13a n.12) and "provides the exclusive remedy for usury claims against a national bank" (*id.* at 13a), Congress had not *additionally* expressed a specific intent to allow removal to federal court of cases arising under those exclusive provisions (*id.* at 13a-15a).[4]

The court of appeals observed that removal based on federal-question jurisdiction "generally is governed by the 'well-pleaded complaint' rule, which provides that a case

[4] The dissenting opinion concluded that removal was permitted, and indeed that federal jurisdiction over usury claims against national banks is exclusive. Pet. App. 17a-20a. We do not argue here that the federal courts have *exclusive* jurisdiction over usury claims against national banks.

may be removed only if the plaintiff's properly pleaded complaint reveals that the claim is based on federal law." Pet. App. 5a (citation omitted). The court of appeals recognized, however, that this Court has also adopted a "corollary" to the well-pleaded complaint rule—referred to sometimes as the "complete preemption" doctrine[5]—permitting removal even when a plaintiff has not invoked (and indeed has abjured) federal law in its state-court complaint. Under that corollary, removal is proper in cases where the plaintiff's claim necessarily must arise under a federally created statute that has entirely supplanted any possible state-law action, even though the plaintiff did not choose to plead a claim under that displacing federal law. *Id.* (noting that removal is proper when "the pre-emptive force of a [federal] statute is so strong that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule") (quoting *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386, 393 (1987)).

Although the court of appeals remarked that the permissibility of removal under this corollary to the well-pleaded complaint rule turns on congressional intent (Pet. App. 8a-9a), it did *not* view as determinative the congressional intent to supplant state law with a federal-law cause of action. Indeed, the court of appeals acknowledged that this Court's case law had long established that Section 30 of the National Bank Act "governs the amount of interest a national bank may charge . . . and provides the exclusive remedy for usury claims against a national bank," *id.* at 13a n.12 (citations omitted)—thus presumably meaning that a plaintiff could invoke *original* federal jurisdiction under 28 U.S.C.

[5] This Court referred to "complete preemption" as a "corollary" of the well-pleaded complaint rule in *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386, 393 (1987), and *Rivet* v. *Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998). We will occasionally use the term "complete preemption" as a shorthand herein.

§ 1331 to bring a usury claim against a national bank. Nonetheless, the court of appeals ruled that more was needed to establish federal *removal* jurisdiction over a usury claim against a national bank; it stated that such removal was improper in the absence of specifically expressed congressional intent to authorize *removal of the particular claims at issue*. *See id.* at 4a, 9a.

The court of appeals then proceeded to a review of the legislative history of the National Bank Act, enacted by Congress during the Civil War. The court acknowledged that Congress intended centrally in the National Bank Act to insulate the national banking system—of which, of course, the newly established national banks were a vital part—from state control and regulation. Pet. App. 9a-11a. According to the court of appeals, however, that undisputed history was insufficient to permit removal in the absence of evidence *additionally* showing that Congress was specifically concerned about the fate of national banks in state *courts*. *See id.* at 11a. The court stressed that, when Congress enacted the National Bank Act, it *permitted* federal usury claims to proceed against national banks in state courts, and did not provide for removal of usury claims at the option of national banks. *Id.* at 11a-12a.

The court observed that the National Bank Act was enacted before passage of either the first general original federal-question jurisdiction statute[6] or the general removal statute for federal-question cases—which since 1875 has provided for removal of *any* federal claim over which the federal courts would have had original jurisdiction[7]—and

[6] Judiciary Act of 1875, § 1, 18 Stat. 470.

[7] The first general federal-question statute, Section 2 of the 1875 Judiciary Act, permitted removal in the course of the action if a federal defense was raised, as well as removal if the complaint asserted a federal-law claim. The general removal statute was first put in a form comparable to the present statute in 1887-88. *See* § 2, 24 Stat. 552 (Mar. 3, 1887),

before this Court's articulation of the well-pleaded complaint rule for federal-question cases[8] and the "complete preemption" corollary to the well-pleaded complaint rule.[9] Nonetheless, the court of appeals did not find the current existence of the *general* removal statute to be a sufficient basis for removal of the usury claim against the Bank in this case. Rather, the court required specific evidence of a particularized congressional intent to allow removal of usury claims arising under the National Bank Act. *See* Pet. App. 13a, 15a. Indeed, the fact that Congress had not yet enacted a general removal statute for cases arising under federal law at the time of the National Bank Act was apparently taken by the majority as evidence that the requisite will of Congress to allow removal of claims arising under Section 30 of the National Bank Act was lacking. The court of appeals thus ruled that, at least when removal jurisdiction is invoked under the "complete preemption" corollary to the well-pleaded complaint rule, there must be a showing that Congress has specifically intended to allow removal with respect to the precise substantive federal law at issue, and that removal cannot be based on the general removal statute. *See id.* at 16a (holding removal improper because "we find no clear congressional intent to permit removal under §§ 85 and 86 of the NBA").

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as corrected, 25 Stat. 433 (Aug. 13, 1888). This form of the removal statute referred directly to "suits of which the circuit courts of the United States are given original jurisdiction by the preceding section," which in turn provided for "arising under" jurisdiction. Thus, the 1887 statute ended the regime of the 1875 statute, under which the district courts' removal jurisdiction over federal-question cases was generally broader than their original jurisdiction over such cases. This history is recounted in *Tennessee* v. *Union & Planters' Bank*, 152 U.S. 454, 459-63 (1894).

[8] *Metcalf* v. *City of Watertown*, 128 U.S. 586 (1888); *Union & Planters' Bank, supra.*

[9] *Avco Corp.* v. *Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557 (1968).

SUMMARY OF ARGUMENT

I. This Court has consistently held that the rate of interest that may be charged by a national bank is exclusively governed by federal law—namely, Section 30 of the National Bank Act—and that any claim for usury against a national bank necessarily arises only under the National Bank Act, which contains a remedial provision directed precisely at such claims. The Court reached that conclusion after considering the nature and structure of the National Bank Act, its antecedents in provisions establishing the earlier Bank of the United States, and the problems to which the National Bank Act was directed: the stabilization of the national currency and national finances in the midst of the Civil War.

II. Respondents therefore necessarily raised a federal claim, and only a federal claim, for usury in their complaint. Such a federal claim would clearly have fallen within the district court's original jurisdiction under 28 U.S.C. § 1331, had respondents chosen to bring it in federal court as an initial matter. Accordingly, the claim can also be removed from state court to federal court under the general removal statute, 28 U.S.C. § 1441, which allows the district court to exercise removal jurisdiction in any case "arising under" federal law over which the court would have had original jurisdiction under § 1331. Respondents cannot avoid removal by the device of artfully pleading only a purported state-law claim and avoiding any reference to federal law. Although, under the "well-pleaded complaint" rule, it is generally the case that a state-law claim may not be removed to federal court merely because the state-law claim is likely to be met by a federal defense (including a defense of federal preemption), that is not the situation here, where the usury claim itself can only arise under federal law, regardless of the label placed on that claim by the plaintiffs. Federal courts have an established duty and power to look behind the words of the complaint and to examine the substance of the controversy to determine whether federal jurisdiction is

present, or absent. In this case, examination of the substance of the controversy reveals that the usury claim in this case can arise only under federal law.

III. Under the "complete preemption" corollary to the well-pleaded complaint rule, in a few areas of law where Congress has so forcefully exercised its constitutional power to supplant state law that any claim must necessarily arise under federal law, a purportedly state-law claim raised in state court is essentially transformed into a federal claim and may be removed to federal court. Like an action for benefits due under an ERISA benefit plan and an action under the federal labor laws involving the construction of a collective bargaining agreement, a usury suit against a national bank is such a case. Indeed, the case for such "complete preemption" is even stronger in this context than it is in the ERISA and labor contexts, for the modern national banking system did not exist until Congress enacted the National Bank Act; national banks have always been understood as instruments by which the federal government effectuates national financial and currency policies; and the National Bank Act establishes a highly detailed set of rules for the operations of national banks, along with a federal administrative agency (the Office of Comptroller of the Currency) to supervise them.

The court of appeals acknowledged that federal law exclusively governs usury claims against national banks, and yet it held that removal of the (necessarily federal) usury claim in this case was improper. The court of appeals believed that, for removal to be proper when the plaintiff ostensibly relies only on state-law claims in its complaint, there must be evidence, not just that Congress intended for those state law claims to be entirely supplanted by federal claims, but *also* that Congress specifically intended that those federal claims could be removed to federal court. There is no basis in this Court's decisions or the removal statute for that unduly restrictive approach to removal jurisdiction. Section 1441 of Title 28 simply provides for removal, at the option of

a defendant, of a federal claim that has been raised in state court. The pertinent question is not whether Congress specifically intended for a particular kind of claim to be removable, but whether the claim at issue is, in substance, federal. If the claim is federal, then § 1441 itself provides that it may be removed, without the need for any further analysis.

IV. Removal of the usury claim against the Bank is proper in this case even though respondents have also attempted to raise other claims and sue other defendants. All the claims may be removed together to federal court under 28 U.S.C. § 1367. Nor is it relevant that state law may govern certain other aspects of national banks; interest and usury, it is clear, are entirely matters of federal law. Respondents' arguments to the contrary are contradicted by an unbroken line of decisions of this Court stretching back more than a century.

ARGUMENT

I. Any Usury Claim Against A National Bank Arises Under Federal Law, And Only Under Federal Law

We begin with the propositions that federal law—and only federal law—governs the amount of interest that a national bank may charge, and the only remedy for usury by a national bank is that provided in the National Bank Act. The court of appeals did not take issue with either of those propositions. Indeed, the court of appeals acknowledged the "well-settled law that [the National Bank Act] provides the exclusive remedy for usury claims against a national bank." Pet. App. 13a. That "well-settled law" has been expounded by this Court in a long line of cases stretching back for more than a century.

In the pioneering case in that series, *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U.S. (1 Otto) 29 (1875)—which was decided just 11 years after the enactment of the usury provisions of the National Bank Act—this Court held that the New York usury statute could not be applied

against a national bank. After undertaking an extensive review of the National Bank Act—including and especially its provisions for the taking of interest by national banks and for usury suits against national banks—the Court concluded that the Act's provisions "form a system of regulations. All the parts are in harmony with each other, and *cover the entire subject*." *Id.* at 32 (emphasis added).

In reaching that conclusion, the Court underscored the historical context in which the national banking system had been established, and found the National Bank Act to rest "on the same principle as the act creating the second bank of the United States," 91 U.S. at 33, which had been upheld in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).[10] Based on the Court's understanding of national banks as means through which the federal government sought to effectuate national policies—such as the establishment and maintenance of a stable and uniform national currency and the assurance of the Union government's ability to finance its operations during the Civil War[11]—the Court stressed that "[t]he national banks organized under the [National Bank Act] are instruments designed to be used to aid the [national]

[10] *See also Easton* v. *Iowa*, 188 U.S. 220, 228 (1903) (reaffirming that "the principles enunciated in *M'Culloch* v. *Maryland*, . . . though expressed in respect to banks incorporated directly by act of Congress, are yet applicable to the later and present system of national banks") (citations omitted).

[11] *See Tiffany* v. *National Bank of Mo.*, 85 U.S. 409, 413 (1873) (noting that national banks "were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government"). *See generally* Bray Hammond, *Banks and Politics in America* 718-39 (1957); *Spellman* v. *Meridian Bank (Del.)*, Nos. 94-3203, -3204, -3215 to -3218, 1995 WL 764548, at *21-*24 (3d Cir. Dec. 29, 1995) (Scirica, J., dissenting), *vacated & set for reh'g en banc*, 1996 U.S. App. LEXIS 2506 (3d Cir. Feb. 16, 1996) (dismissed before rehearing).

government in the administration of an important branch of the public service." 91 U.S. at 33.

The Court thus concluded that "the States can exercise no control over [national banks], nor in any wise affect their operations, except in so far as Congress may see proper to permit," and that any attempt by a State to regulate national banks would be the "usurpation of power." 91 U.S. at 34. Nor did the Court find any evidence that Congress intended to permit the States to "supplement [the interest provisions of the National Bank Act] by State legislation." *Id.* at 35. And finally, the Court emphasized that where, as in the National Bank Act, "a statute creates a new offence and denounces the penalty, or gives a new right and declares the remedy, the punishment and the remedy can be only that which the statute prescribes" and cannot be found in any other system of laws, such as state law. *Id.*

The Court's holdings in *Dearing*—that Congress had provided a complete "system of regulations" governing the taking of interest by national banks, defining usury and providing the penalties for any violation, and that Congress had displaced all state usury laws from application to national banks—have been followed consistently by this Court for more than a century, and indeed have never been seriously questioned.[12] This unbroken line of authority

[12] *See Barnet* v. *Muncie Nat'l Bank*, 98 U.S. 555, 558 (1878) ("The statutes of Ohio and Indiana upon the subject of usury . . . cannot affect the case [because] . . . [w]here a statute creates a new right or offence, and provides a specific remedy or punishment, they alone apply[;] [s]uch provisions are exclusive."); *Carter* v. *Carusi*, 112 U.S. 478, 483 (1884) (holding that Section 30 of National Bank Act provides "the exclusive remedy" for taking of excessive interest by a national bank, and rejecting borrower's argument that he had a common-law right to reclaim or set off usurious interest); *First Nat'l Bank of Charlotte* v. *Morgan*, 132 U.S. 141, 144 (1889) ("A suit against a national bank to recover back twice the amount of interest illegally taken by it is a suit to recover a penalty incurred under a law of the United States."); *Haseltine* v. *Central Nat'l Bank*, 183 U.S. 132, 134 (1901) ("[T]he note in question was given to a

reflects the Court's consistent understanding of Congress's design in the National Bank Act. As the Court explained in *Tiffany* v. *National Bank of Missouri*, 85 U.S. 409 (1873), which predated even its decision in *Dearing*, Congress's paramount concern in establishing the interest provisions of the National Bank Act, including the exclusive federal usury remedy, was to protect the national banks that formed the nascent national banking system from strangulation by the States, which had vested interests in their own banking systems. As the Court noted in *Tiffany*, Congress expected that national banks "would come into competition with State banks" and anticipated the prospect of "unfriendly State legislation." *Id.* at 412. To avoid even the possibility of "unfriendly legislation by the States, or . . . ruinous competition with State banks," Congress determined that national banks should have certain "advantages" over their state competitors, including advantages in charging interest. *Id.* at 413.

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national bank, the definition of usury and the penalties affixed thereto must be determined by the national banking act, and not by the law of the state."); *Evans* v. *National Bank of Savannah*, 251 U.S. 108, 109, 111, 114 (1919) ("Whether transactions by [a national bank] are usurious and the consequent penalties therefor[] must be ascertained upon a consideration of the National Bank Act.") ("The National Bank Act establishes a system of general regulations [and] adopts usury laws of the states only in so far as they severally fix the rate of interest.") ("[F]ederal law . . . completely defines what constitutes the taking of usury by a national bank, referring to the state law only to determine the maximum permitted rate."); *McCollum* v. *Hamilton Nat'l Bank of Chattanooga*, 303 U.S. 245, 245-46 (1938) (applying rule that Section 30 of the National Bank Act "governs the rates of interest to be taken by national banking associations and . . . declares [the penalty for] the receiving of a rate of interest greater than that allowed"); *Marquette Nat'l Bank* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 308, 319 n.31 (1978) ("The interest rate that [the national bank] may charge . . . is . . . governed by federal law[.]"); *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996) ("there is no doubt that § 85 pre-empts state law"; "the protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court") (internal quotation marks omitted).

"National banks," the Court emphasized, "have been National favorites." *Id.*; *see also Marquette Nat'l Bank* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 314 (1978).

II. A Plaintiff Cannot Avoid Congress's Total Supplantation Of State Law Claims With Federal Law And Defeat Removal By Artfully Pleading A Nonexistent State-Law Claim

Because the complaint in this case raised a usury claim against a national bank, and because (as this Court has made clear on numerous occasions) such a claim can arise only under federal law, that claim necessarily "arises under" the laws of the United States and falls within the jurisdiction of the district courts under § 1331 over cases arising under federal law. Respondents, however, have maintained that their complaint simply raised a claim of state law—a choice they were purportedly entitled to make as the framers of their complaint—and that petitioners are attempting to effectuate removal based on a federal defense of preemption. But while the assertion of a federal defense to a state-law claim ordinarily will not support federal jurisdiction at the behest of either the plaintiff or the defendant, that is not the situation in this case. Rather, this is a case where the plaintiffs are attempting to avoid federal jurisdiction by "artfully pleading" a claim that is necessarily federal in substance as a state-law claim. Such artful pleading cannot defeat federal jurisdiction.

Under the "well-pleaded complaint" rule, a lawsuit in which the claim in fact arises under state law, but is expected to be met by a defense under federal law, does not, in the usual case, "arise under" the laws of the United States, so as to permit either the plaintiff to file a complaint in federal court or the defendant to remove such a case if filed in state

court.[13] This rule was apparently derived from the system of common-law pleading, in which the plaintiff was bound to plead only its entitlement, and was not permitted to anticipate what it would say in any reply that it would file to the defendant's plea or answer. *See, e.g., Louisville & Nashville R. R. Co.* v. *Mottley*, 211 U.S. 149, 152-53 (1908).[14]

This case, however, does not involve an anticipatory reply. The only source of law that could support the usury claim here is federal law. If federal law is violated by the terms of the loan, a series of federal remedies, some quite draconian involving forfeitures, is available; if federal law is not violated by the terms of the loan, then there is to be a judgment that respondents take nothing, whatever Alabama state law may say. What is presented here is not a federal defense, but a federal cause of action, and one that is exclusive. Respondents' complaint is disingenuously pleaded, not "well pleaded" in any respect, for it purports to raise a state law claim that does not exist, and it disavows reliance on the only source of law that could support a usury claim, federal law (*viz.*, the National Bank Act).

This Court has never countenanced efforts to avoid federal jurisdiction through such pleading devices that lack a real and substantial basis. Although it is sometimes said that, for federal jurisdiction purposes, the plaintiff is "master of the claim,"[15] the Court has long recognized limits on that

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[13] *Rivet*, 522 U.S. at 475 (citing *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 63 (1987)).

[14] In *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 673-74 (1950), this Court held that a party could not use the declaratory judgment procedure to present a federal defense as if it were part of a claim. *Skelly Oil* was apparently the first instance of the Court's use of the phrase "artful pleading," although not of course the first in which it had applied the concept that a federal court has the duty to examine the true nature of a plaintiff's claim.

[15] *See, e.g., Caterpillar, Inc.* v. *Williams*, 482 U.S. 386, 392 (1987).

aphorism. Where the plaintiff has a real choice between a state and a federal claim, the plaintiff is indeed the "master of the claim" and has the right to make that choice. The plaintiff does not, however, have the right to conceal the necessarily federal nature of the claim where (as here) there is no alternative state claim. As the Court recently explained in *Rivet* v. *Regions Bank of Louisiana*, 522 U.S. 470, 475-76 (1998):

> Allied as an "independent corollary" to the well-pleaded complaint rule is the further principle that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." If a court concludes that a plaintiff has "artfully pleaded" claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint. The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim.

In the words of the Court's decision in *Rivet*, the state claim is "transformed" into a federal claim. *Id.* at 476.

The Court's refusal to accept a plaintiff's ostensible reliance on nonexistent (or "completely preempted") state-law claims is simply one aspect of the more general principle that a federal court need not accept at face value the words printed in the plaintiff's complaint, but rather has a duty to examine the real nature of the plaintiff's case to determine whether federal jurisdiction is present. This is true with respect to diversity cases as well as cases arising under federal law, whether originally filed in federal court or originally filed in state court and removed to federal court. This Court's recent treatment of the subject in *Rivet* follows a long line of cases disallowing manipulations by plaintiffs designed to create or avoid diversity jurisdiction, such as misaligning the interests of the parties, naming parties (whether plaintiffs or defendants) who have no real interest in or relationship to the controversy, misstating the

citizenship of a party (whether plaintiffs or defendants), or misstating the amount in controversy.

In *City of Indianapolis* v. *Chase National Bank*, 314 U.S. 63 (1941), the Court made clear that federal courts must "look beyond the pleadings, and arrange the parties according to their sides in the dispute" in determining whether there is truly diversity of citizenship. *Id.* at 69 (quoting *City of Dawson* v. *Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co.*, 197 U.S. 178, 180 (1905)). The Court realigned the parties in *Chase* according to their interests in the actual controversy, concluded that there was not actually complete diversity of citizenship, and admonished as follows:

> Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary collision of interest exists, is therefore not to be determined by mechanical rules. It must be ascertained from the principal purpose of the suit, and the primary and controlling matter in dispute.

314 U.S. at 69 (citations and internal quotation marks omitted). Similarly, a federal court need not and should not simply adopt the plaintiff's view as to who are the proper parties to the dispute.[16] Federal courts also must determine whether the alleged jurisdictional amount is truly in controversy.[17]

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[16] *See Ex Parte Nebraska*, 209 U.S. 436, 445 (1908) (federal court should itself decide for jurisdictional purposes whether a state is the real party plaintiff, even when the state is not named as such, and whether a state is not the real party plaintiff, even when it is nominally identified as a plaintiff); *Wecker* v. *National Enameling & Stamping Co.*, 204 U.S. 176 (1907) (ruling that codefendant was joined baselessly to defeat diversity jurisdiction); *Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921) (similar). *See generally* 13B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3607 (3d ed. 1998).

[17] *See Thomson* v. *Gaskill*, 315 U.S. 442, 446 (1942); *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938) (plaintiff may not defeat jurisdiction by reducing amount in controversy following removal).

Thus, if a North Carolina plaintiff sued a South Carolina defendant in North Carolina state court for an amount in excess of $75,000 but claimed that both parties were North Carolina citizens, the plaintiff's allegations of citizenship could not defeat federal diversity jurisdiction; if the defendant filed a notice of removal, the district court could make an independent determination of the citizenship of the parties. This is a not-uncommon experience in the district courts, and the district courts will not grant a plaintiff's motion to remand based on the plaintiff's version of the citizenship of the parties, if the defendant can demonstrate that the plaintiff's characterization is wrong and that diversity exists. *See generally* 15 *Moore's Federal Practice* §§ 102.30 through 102.56 (3d ed. 2002).

Likewise, in cases "arising under" federal law, the lower federal courts have long followed this Court's admonitions to examine the real nature of actions removed from state courts. As one federal district court explained 30 years ago:

> Removal is always proper where the real nature of the claim asserted in the complaint is federal, irrespective of whether it is so characterized, and even where plaintiff inadvertently, mistakenly or fraudulently may have concealed a federal question that would necessarily have appeared if the complaint had been well-pleaded.

City of Galveston v. *International Org. of Masters, Mates & Pilots*, 338 F. Supp. 907, 909 (S.D. Tex. 1972); *see also New York* v. *Local 1115 Joint Bd.*, 412 F. Supp. 720, 722 (E.D.N.Y. 1976) ("[P]laintiff may not, by artful pleading, cast a claim, the essence of which is a federal right, in terms of State law and thereby defeat removal."); *Sylgab Steel & Wire Corp.* v. *Strickland Transp. Co.*, 270 F. Supp. 264, 267 (E.D.N.Y. 1967) ("The mere fact . . . that plaintiff makes no

specific reference to federal law in his pleading, and strenuously objects to the inference that his cause of action is so based, cannot be decisive in determining jurisdiction.").

In sum, there are two closely related aspects of the "well-pleaded complaint" rule in the context of "arising under" cases, which in fact are no more than two faces of the same coin. The primary rule states that the right of action pleaded by the complaint generally governs, and that efforts to plead a reply to an anticipated defense will be disregarded. The "corollary," sometimes called the "complete preemption" corollary, is found where federal law has "transformed" the state claim into a federal one. *Rivet*, 522 U.S. at 476. In such a case, the complaint is to be treated as arising under federal law, since that is the only basis on which the plaintiff's claim can be made at all, irrespective of whether the plaintiff has attempted to affix a state-law label to it. In such a case, an assertion that the claim arises under state law is *not* pleading "well," and the courts are to treat the complaint as if it had correctly pleaded federal law.[18]

[18] Although some older cases considered the plaintiff's intent in mischaracterizing the jurisdictional situation, it is now the predominant view that the federal court need not inquire into the intent of the plaintiff in characterizing its case as it did. Rather, the court's proper analysis is directed to determining the true nature of the controversy presented. If the case is mischaracterized, for whatever reason, when assessed against Congress's intent in providing for federal jurisdiction, then the federal court is free, and indeed is obligated, to recharacterize the complaint in accordance with the realities of the situation and with that congressional intent. *See, e.g.*, 15 *Moore's Federal Practice* § 102.21[5][a], at 102-56 (3d ed. 2002) (so-called "fraudulent joinder" may be proven either by showing inability to prove a claim against defendant or outright fraud).

III. Because A Usury Claim Against A National Bank Necessarily Arises Under Federal Law, It May Be Removed To Federal Court, Notwithstanding The Plaintiff's Purported Reliance Only On State Law

A. A Claim That Necessarily Arises Under Federal Law Can Be Removed Without A Further Showing That Congress Specifically Intended For That Claim To Be Removable

1. We have shown that respondents' usury claim necessarily arises under federal law, even though they have purported to rely only on state law. We have also shown that a federal district court presented with a notice of removal invoking the court's "arising under" jurisdiction may examine the substance of the complaint to determine whether the claim is in fact federal in nature, notwithstanding the state-law label. To be sure, it is only in a small minority of cases that a federal court is called upon to disregard the plaintiff's express reliance on state law and disavowal of federal law in this manner. Nonetheless, it is an established practice for the federal courts to do so in those few areas of law in which Congress has forcefully exercised its constitutional powers to supplant state regulation and has fashioned federal causes of action that are analogous to, although perhaps not completely coextensive with, the displaced state law. In such situations, any claim *must* be a federal question over which the district courts have "arising under" jurisdiction.

The leading case establishing this principle is *Avco Corp* v. *Aero Lodge No. 735, International Ass'n of Machinists*, 390 U.S. 557 (1968). *Avco* involved the construction of a collective bargaining agreement enforceable in federal court under Section 301 of the Labor-Management Relations Act of 1947 ("LMRA"). The Court had previously construed LMRA § 301 as providing not merely a basis for federal-court jurisdiction over disputes involving collective bargaining agreements, but also a direction to the federal

courts to fashion federal rules for the construction and enforcement of such agreements. *See Textile Workers Union* v. *Lincoln Mills of Ala.*, 353 U.S. 448 (1957). *Avco* held that this congressional direction to apply federal law included as well a direction *not* to apply state law to collective bargaining contracts: "[A]n action arising under Section 301 is controlled by federal substantive law even though it is brought in a state court." 390 U.S. at 560. And since federal substantive law controlled the construction of the collective bargaining agreement, it necessarily followed that any complaint raising such an issue of construction could be removed to federal court for that court to exercise its "arising under" jurisdiction.

In *Avco*, the plaintiff, an employer, had filed a complaint in state court to enjoin a strike on the grounds that the strike violated a "no strike" clause agreed to in a collective bargaining contract. This Court affirmed the denial of the motion to remand, observing that removal is but one aspect of the "primacy of the federal judiciary in deciding questions of federal law." 390 U.S. at 560. Moreover, whether or not the plaintiff had pleaded the case as one arising under federal law, the Court concluded that "it is thus clear that the claim under this collective bargaining agreement is one arising under the 'laws of the United States' within the meaning of the removal statute," and that the claim would therefore fall within the original jurisdiction of the district court. *Id.* The Court reached that conclusion even though the particular remedy that the plaintiff sought, an injunction against the strike, was barred in federal court under the Norris-LaGuardia Act (and even though the employer had presumably filed suit in suit state court precisely so that it could obtain such an injunction). *See id.* at 560-61.

Avco makes clear that, where federal law displaces state law as a basis for a claim, a suit that purports to arise under the displaced state jurisprudence nonetheless arises under the laws of the United States. Like any other federal claim, it is subject to removal under 28 U.S.C. § 1441, absent a federal

statute expressly precluding removal. It is irrelevant that the rules or remedies applicable under federal law are different from those which might have applied under state law, and that they may be disappointing to the plaintiff. Moreover—and of considerable significance in the present case—the Court in *Avco* did *not* look for the presence of congressional intent, revealed in the legislative history or otherwise, with respect to the specific issue of removability. Rather, the conclusion that the case was removable to federal court under § 1441 followed simply from the fact that the case arose under the laws of the United States, without any further requirements or analytical steps.

The Court next visited the subject in *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). That case involved the Employee Retirement Income Security Act of 1974 ("ERISA"), a statute that federalized certain kinds of controversies involving the construction of qualified employee benefit plans. The California taxing authorities brought suit in a California state court against the Vacation Trust, an ERISA-qualified welfare benefit trust, seeking to collect taxes, and the Vacation Trust removed the case to federal district court. This Court reversed decisions of the lower federal courts permitting removal of the case. As the Court explained, ERISA did not provide the California taxing authority with any basis for proceeding against the Vacation Trust (even though ERISA authorized suits under federal law by individual beneficiaries to obtain benefits promised them under the plan). Thus, the only federal issue in the case was the expected interposition of a federal defense of preemption, which under the "well-pleaded complaint" rule does not provide a basis for removal to the district court. 463 U.S. at 25, 27. The Court focused on whether the particular claim in question had been converted by Congress into a federal claim, and concluded that it had not. Once again, as in *Avco*, the Court made no mention of any requirement to show an intent by Congress to permit removal of the specific claim at issue.

In *Metropolitan Life Insurance Co.* v. *Taylor*, 481 U.S. 58 (1987), by contrast, the Court held that ERISA had federalized all employee claims to recover benefits under covered plans, so that any such claims could be brought in, or removed to, a federal district court under its "arising under" jurisdiction. *Id.* at 64-65. The Court observed that "federal pre-emption is ordinarily a federal defense to the plaintiff's suit," and that such a defense "does not appear on the face of a well-pleaded complaint, and therefore, does not authorize removal to federal court." *Id.* Nevertheless, the Court went on to reaffirm that "[o]ne corollary of the well-pleaded complaint rule developed in the case law . . . is that Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Id.* at 63-64. When Congress "displace[s] entirely any state cause of action" in an identified area, "any such suit [in that area] is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of the [displacing statute]." *Id.* at 64.

As to whether the particular claims involved—suits by beneficiaries to obtain benefits with respect to a plan subject to ERISA—were governed by federal law displacing state law, the Court found dispositive a provision of ERISA stating as follows:

> The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

29 U.S.C. § 1132(f). That language was virtually identical to the language in § 301 of the LMRA that the Court had held, in *Avco*, to federalize all substantive law governing construction and enforcement of collective bargaining contracts. The Court also referred to a passage in the conference report accompanying ERISA, in which the conferees stated, referring

to suits to obtain benefits, that "[a]ll such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." 481 U.S. at 65-66.

In the face of that indisputable evidence that Congress had intended ERISA claims for benefits to be treated as purely and solely federal, the Court held that, even though Taylor had taken pains to avoid pleading a federal right of action (as did the respondents here), the case in fact arose under the laws of the United States and thus fell within the district court's removal jurisdiction under § 1441. 481 U.S. at 67. The Court did not look in the ERISA text or in the legislative history for special references to removability; nor did the statutory provision or the conference report speak about removability. Rather, once the suit was identified as one arising under the laws of the United States, removability followed inevitably.

2. Two ambiguities in what appear to be clear-cut decisions seem to have caused confusion in the lower courts, including the court below. In *Metropolitan Life*, the Court noted that only once before—in *Avco*—had it ruled that federal law so "completely preempted" state law in an area that any claim in that area must necessarily arise under federal law. 481 U.S. at 64. This point, coupled with the *Metropolitan Life* Court's quotation from the ERISA conference report's reference to § 301 of the LMRA, has led some courts and commentators mistakenly to believe that a federal court may conclude that a purportedly state-law cause of action is removable under the "complete preemption" doctrine *only* where Congress enacts in a statute the same language as that of § 301 of the LMRA, or perhaps refers to § 301 in the legislative history.[19]

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[19] *See, e.g.*, *Aaron* v. *National Union Fire Ins. Co.*, 876 F.2d 1157, 1165 (5th Cir. 1989); *Klussman* v. *Cross-Country Bank*, No. C-01-4228-

Nothing in logic or in this Court's decisions supports that position, however. While the Court in *Avco* ascribed some importance to the language used by Congress in LMRA § 301 to hold that the law governing construction and enforcement of collective bargaining agreements is exclusively federal, the Court's greater emphasis lay on the nature of the subject of federal regulation. And while Congress's use in ERISA of similar statutory language and its reference in the ERISA conference report to LMRA § 301 made *Metropolitan Life* a straightforward case in which to hold that Congress had intended ERISA benefit suits to be governed by federal law and removable, the Court did not suggest that *only* such language could lead to a similar conclusion.

Second, a concurring opinion by Justice Brennan in *Metropolitan Life* referred in passing to the clear congressional intent in ERISA *to permit removal*. 481 U.S. at 67-68. But the opinion for the Court, joined by all the Justices, did not suggest that removal of a "completely preempted" and necessarily federal claim is proper only when there is affirmative evidence of congressional intent *to permit removal of that kind of claim*; the only congressional intent that was relevant was an intent that the suits in question necessarily "aris[e] under the laws of the United States." Justice Brennan's concurring remarks appear to have been a shorthand for an intent reflected in the statute that the claim in question arises exclusively under the laws of the United States—as, of course, do usury claims against a national bank. *See* pp. 11-14, *supra*.

Indeed, in a unanimous decision of the Court delivered by Justice Brennan just nine weeks later, *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386 (1987), the Court (although finding

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SC, 2002 WL 1000184, at *5 (N.D. Cal. May 15, 2002); *see also Spellman* v. *Meridian Bank (Del.)*, Nos. 94-3203, -3204, -3215 to -3218, 1995 WL 764548, at *6 (3d Cir. Dec. 29, 1995), *vacated & set for reh'g en banc*, 1996 U.S. App. LEXIS 2506 (3d Cir. Feb. 16, 1996) (dismissed before rehearing).

removal improper in that particular case), made clear once again that a plaintiff cannot defeat removal of a claim that is actually and in substance federal by artfully pleading the claim as arising under state law: "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.* at 393. Nor did the Court suggest in *Caterpillar* that a defendant seeking to remove a state-law claim on the ground that it has been "completely preempted" must show that Congress intended to authorize removal for the particular kind of state claim at issue.[20]

In these cases, the Court's focus was on the true basis of the plaintiff's complaint: Where a state-law claim was actually available to the plaintiff, the plaintiff could choose to rely only on state law, even if that complaint might be met by a federal defense of preemption; but where only federal law was available as a basis for any claim, the plaintiff could not defeat federal jurisdiction by purporting to rely on a nonexistent state-law claim.[21] In each case, the intent of Congress in superseding and displacing any state-based claim with a federal claim—*not* its intent specifically to permit removal of that federal claim—was the touchstone for removal jurisdiction under § 1441.

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[20] In *Caterpillar*, the Court further summarized the well-pleaded complaint rule by stating that "[o]nly state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." 483 U.S. at 392. The Court did not qualify that summary further; it did not state, for example, that only state-court actions that could have been filed in federal court *and* as to which there was specific congressional authorization for removal may be removed to federal court.

[21] The analysis in *Rivet* v. *Regions Bank of Louisiana*, 522 U.S. 470 (1998), is similar; the Court looked to see whether the claim "arose under" federal law, not to see separately whether Congress intended removal. In *Rivet*, the claim was found not to "arise under" federal law.

B. Usury Claims Against National Banks Are Removable

Under the principles from this Court's cases just discussed, it is clear that respondents' usury claim is federal and therefore removable. Indeed, this is an *a fortiori* case from the situations in *Avco* and *Metropolitan Life*. In those cases, although federal law exclusively governed the adjudication of the disputes before the Court, Congress expected that the federal law would, in large part, be drawn from state-law concepts of contract and fiduciary law, and Congress had not provided a comprehensive or detailed statutory guide to the interpretation of collective bargaining contracts or benefit plans. Moreover, both collective bargaining agreements and benefit plans had existed long before the enactment of the pertinent statutory laws (the LMRA and ERISA), and the interpretation of those agreements had previously been a matter of state law.

By contrast, the national banking system never existed before the enactment of the National Currency Act in 1863 and the addition of Section 30 in the National Bank Act of 1864. Moreover, as the Court recognized in *Dearing* and in the long line of cases following it (*see* pp. 11-14, *supra*), Congress intended national banks to be instruments by which the national government accomplished its fundamental policy goals of stabilizing the national currency and the government's finances. Accordingly, when Congress created the national banking system, it provided for the governance of the national banks in that system through a highly detailed federal statute, which includes provisions regulating the taking of interest by national banks as well as remedies and penalties for violations of those provisions. A federal administrative agency—the OCC—closely supervises the regulation of national banks and has the authority to define, on a basis entitled to the highest degree of respect, the terms of what constitutes "interest" for the purposes of the statute. *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 747 (1996). The national bank usury statute is thus a paradigm of total supplantation of state law by federal law.

Respondents argue (Br. in Opp. 5-6) that "complete preemption" is only a narrow exception to the general rule that a plaintiff is free to choose the law on which it relies for its claim. That may well be so, but here that exception (or corollary) is to be applied quite narrowly—to usury suits against national banks. Suits against national banks for usury constitute a select group of claims that are exclusively governed in right and remedy by a federal statute. Indeed, the exclusivity of federal law as the basis of the usury claim here is even more apparent than it was with respect to the claims at issue in *Avco* and *Metropolitan Life*. In those cases, a broad panoply of contract claims and claims for breach of fiduciary duty was held to fall within the federal courts' "arising under" jurisdiction of 28 U.S.C. § 1331, even though the LMRA and ERISA govern a multiplicity of potential issues and do not provide specific rules of decision or remedies for many situations. Here, a highly detailed federal statute governs the subject of usury for national banks. A recognition that the corollary of "complete preemption" applies to cases such as this one requires no extension of that doctrine.

C. The Court Of Appeals Erred In Requiring Evidence Of Specific Congressional Intent To Permit Removal Of Usury Claims

The rationale given by the court of appeals for its contrary result has little to commend it. The court of appeals emphasized that it had not found any specific intent on the part of Congress to authorize removal of usury claims against national banks—even though it *also* acknowledged that all such usury claims are necessarily federal in nature. Pet. App. 13a. As a logical matter, the court of appeals' reasoning would also preclude removal of usury claims against national banks that *expressly* relied on federal law. But such a result would be outlandish; no decision of this Court remotely suggests that a state-court complaint that openly invokes federal

law as the basis of a claim can be removed only when Congress has specifically authorized removal of that particular kind of claim. If that were the rule followed by the federal courts, then the general removal jurisdiction statute, 28 U.S.C. § 1441, which permits removal of any claim that would fall within the district court's original federal-question jurisdiction, would be entirely pointless.

The court of appeals stressed that the National Bank Act provided that suits against national banks could be filed in state court or in federal court (as is true today), and that Congress did not include national banks in a later 1868 statute which permitted certain federally-chartered entities to effect removal on the basis of simple preemption (that is, a federal defense). Pet. App. 10a-12a. But the issue in this case is not whether usury claims against national banks would have been removable in 1864 or 1868; it is whether such claims are removable *now*, and the proper way to determine the intent of Congress on that question is to read the jurisdictional statutes that it has enacted and that remain in force. The pertinent jurisdictional statute is § 1441, and the design of that statute is that *any* federal claim may be removed, *except* where Congress has provided to the contrary—as in, for example, cases arising under the Federal Employers' Liability Act, where Congress has expressly *precluded* removal, *see* 28 U.S.C. § 1445(a).

Nor is it necessary to establish, as the court of appeals seemed to believe, that the Congress that enacted the National Bank Act was particularly concerned about state courts' treatment of usury claims against national banks. Removal under § 1441 does not depend on a showing of state-court hostility to a particular federal right or claim. Rather, Congress has made removal available across-the-board to defendants against whom a federal claim is made in state court. The only pertinent points with respect to the actions of the Civil War Congress is that that Congress made the subject matter of interest charged by national banks exclusively a matter of federal regulation and created an exclu-

sive federal cause of action to address usury by national banks—points that the court of appeals did not question. It was a subsequent Congress that enacted § 1441, providing that all federal causes of action in state courts (including but not limited to usury claims under the National Bank Act) shall generally be removable, except in those few circumstances where Congress has *expressly* delineated that removal of federal claims is not permitted. And the propriety of the institutional reasons for which Congress has authorized removal of federal claims (*e.g.*, to ensure greater uniformity of decisions interpreting federal law) are not a matter for debate in this case.

It is no response to say that the state courts will presumably apply federal law properly to respondents' usury claim, and that any error in the state courts' analysis of the federal claims in this case can be brought to this Court on certiorari. The argument that removal is unwarranted here because any federal usury claim under the National Bank Act can be resolved by the Alabama courts and (eventually, perhaps) this Court is simply contrary to the policy of the removal statute itself. Congress provided in § 1441 that defendants should have the option of bringing a federal claim into federal court, even though Congress is also well aware that state courts routinely decide countless federal issues, and that this Court decides federal issues in many cases from the state courts.

The court of appeals apparently believed that, if Congress was really concerned by local prejudice or the fabrication of nonexistent state usury claims, it should have excluded jurisdiction in the state courts altogether. This overlooks the fact that almost all claims arising under federal law can legitimately be filed by a plaintiff in state court. The starting point is the general presumption that state courts enjoy concurrent jurisdiction over federal claims. *See Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981); *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 507-08 (1962). This presumption only "can be rebutted by an ex-

plicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Gulf Offshore Co.*, 453 U.S. at 478.

Nor is there any logical relation between exclusive federal jurisdiction and the "complete preemption" corollary permitting removal of federal claims from state court. In fact, state courts have concurrent jurisdiction over cases claiming benefits due under an ERISA plan and cases arising under LMRA § 301—two situations where this Court has expressly concluded that state-law claims are "completely preempted" by federal law and may be removed to federal court. *See* 29 U.S.C. § 1132(e)(1); *Charles Dowd Box*, *supra*. If the defendant is content to have such cases heard in state court, they will be heard there. *See Avco*, 390 U.S. at 560 n.2. *Cf. Rosciszewski* v. *Arete Assocs.*, 1 F.3d 225, 232 (4th Cir. 1993) (unlike LMRA and ERISA claims, federal courts have exclusive original jurisdiction over copyright claims). The removal statute exists for those cases "arising under" federal law in which the defendant does *not* consent to a state-court forum.

At all events, the policy of the general federal removal statute, § 1441, is clear and straightforward: When a plaintiff raises a federal claim, the defendant has the option to have that federal claim decided in federal court. No further analysis of congressional intent to allow removal of usury claims against national banks is either necessary or proper.[22]

[22] Given the clarity of the removal statute and the well-settled law establishing that usury claims against national banks are necessarily federal, it is not incumbent upon us to establish that any particular *harm* would fall upon petitioners, or upon national banks more generally, if removal of such usury claims were not permitted. Nonetheless, we do note that, as *amici* American Bankers Association *et al.* persuasively explain, *see* ABA Br. 23-29, purportedly state-law usury claims brought in state courts against national banks (including claims seeking remedies not available under federal law) are not rare; state courts unfortunately do not always properly recognize such claims as preempted, and do not always dismiss them even when they lack merit under federal law; and the uncertainty created by the mere pendency of such state-court litigation can be adverse to the operations of a national bank (as the Comptroller has recognized, *see* ABA Br. 26). Respondents presumably did not file their suit in state court and oppose removal with the expectation that a local state judge in their own community would apply federal law and dismiss their usury claim. Perhaps there was some expectation that dismissal would not speedily occur, and that the case might remain in state court unadjudicated for a year, after which an amendment could be made to the complaint to remove the $74,900 cap from the recovery sought for each plaintiff, thus avoiding removal based on diversity jurisdiction (*see* 28 U.S.C. § 1446(b)). Perhaps the case was filed under the expectation that the prospect of taking the case up through the appellate levels in the Alabama court system was not an enticing one for the petitioners. Whatever the reason for respondents' claim to invoke nonexistent state usury law in the state courts against a national bank, such litigation tactics resemble the "game of chess" that this Court condemned in *Chase*, *supra*.

IV. RESPONDENTS' VARIOUS OTHER ARGUMENTS AGAINST REMOVAL ARE WITHOUT MERIT

Respondents have made a number of other arguments against removal in this case, all of which are without merit. First, they contend (Br. in Opp. 3-5, 9) that, by adding claims against entities that are not national banks and by including closely related state-law claims such as for fraud and breach of fiduciary duty, they have made the suit non-removable. However, it is well settled that if any claim falling under 28 U.S.C. § 1331 is made against any defendant in a multi-defendant, multi-claim suit, the entire case is removable, and all related claims and all defendants "come along" to federal court under the supplemental jurisdiction statute, 28 U.S.C. § 1367(a). That statute provides:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same

> case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Clearly, § 1367 "applies with equal force" to removed cases and to cases initially filed in federal court, because "a removed case is necessarily one 'of which the district courts . . . have original jurisdiction.'" *City of Chicago* v. *International Coll. of Surgeons*, 522 U.S. 156, 165 (1997) (quoting 28 U.S.C. § 1441(a)); *see also* 28 U.S.C. § 1441(c); *American Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 14 (1951) ("[W]here there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under [section] 1441(c).").

A review of the allegations and structure of the complaint in this case demonstrates that all the claims raised by respondents are part of the same Article III "case or controversy" within the meaning of § 1367, and so all the non-usury claims and claims against entities other than the Bank fall within the district court's supplemental jurisdiction on removal. Claims are part of the same constitutional "case or controversy" if they "derive from a common nucleus of operative fact." *City of Chicago*, 522 U.S. at 164-65 (quoting *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966)). The counts in the complaint allege wrongs resulting from the same common scheme, which is asserted in the "Factual Allegations" (Complaint ¶¶ 32-37), App. 23-24, and repeated in each of the five counts, App. 24-29. Thus, the parties' alleged relationship here served as a common nucleus of operative fact for the federal usury claim and for all the state-law claims. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 303 (3d Cir. 1998) ("That implementation of Prudential's scheme resulted in a variety of unlawful transactions does not negate the common basis they all shared."); *Krispin* v. *May Dep't Stores*, 218 F.3d 919, 925 (8th Cir. 2000) (ruling of common nucleus of operative fact in national bank usury suit in removed case).

Respondents also argue (Br. in Opp. 6-8) that this case is distinguishable from *Avco* and *Metropolitan Life* because the National Bank Act as a whole does not make all state laws totally inapplicable to national banks but, rather, leaves certain activities of national banks governed at least to some extent by state law.[23] But we do not argue (and we do not need to argue) that all cases against national banks, or all cases in which the National Bank Act may be implicated, are removable. Rather, what we do maintain—and all that is at issue here—is that usury suits against national banks are removable. That submission is based on the clear evidence that Congress intended the particular subject matter of usury by a national bank to be governed exclusively by the National Bank Act—a point this Court has accepted in numerous earlier decisions (*see* pp. 11-14, *supra*).

Finally, and as an apparent last resort, respondents claim (Br. in Opp. 10-19) that the National Bank Act provides for state law, not federal law, to determine the rate of interest that may be charged by a national bank. This assertion contradicts the long line of cases from this Court and other federal courts that have held that the interest provisions and usury remedies of the National Bank Act are federal law. The federal nature of these provisions is indeed apparent from the face of 12 U.S.C. § 85, which provides for a *federal* standard of permissible interest that may be charged by a national bank. A national bank may take interest at the highest of three available rates: the discount rate of the Federal Reserve, adjusted upwards, or any interest rate permissible under the law of the state of the bank's "location," either generally or for state-chartered banks in that state, whichever is higher. In addition, Congress defined the state of the bank's

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[23] *See Barnett Bank* v. *Nelson*, 517 U.S. 25, 33 (1996) (listing matters left to state law).

"location" under *federal* law to be the state referred to in the bank's charter, and under *federal* law allowed a national bank to charge interest at the highest of any of these rates *nationwide*, without regard to the laws of the other 49 states, including cases (like this) where the normal rules of conflicts of laws might have designated a different State's law. *See Marquette*, 439 U.S. at 313-19. The National Bank Act's usury provisions thus provide a clear example of a "federal statute . . . that . . . 'converts an ordinary common law complaint into one stating a federal claim . . . .'" *Caterpillar*, 482 U.S. at 386.

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There are natural human tendencies to favor one's neighbors, whether or not they are one's constituents. The Framers of the Constitution were aware of these tendencies, and so provided the federal courts as a forum where federal claims could be decided without concern for state parochialism. Congress has put into execution this constitutional policy by allowing both plaintiffs and defendants to invoke that federal court jurisdiction for the adjudication of a federal claim. Since enactment of the general federal question statute (in 1875) and the general removal statute (in 1887), it has been the unbroken policy of Congress that parties may elect to have federal claims in civil cases decided by federal courts. The court of appeals' decision is not faithful to that policy, and accordingly should be reversed.[24]

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[24] Indeed, Congress has, if anything, facilitated the removability of federal-question cases since the first general removal act limited to such cases was enacted in 1887. In 1948, the old procedure, under which the petition for removal was required to be addressed to the state court, was abandoned in favor of the present procedure, where removal is automatic subject to a motion to remand addressed to the federal district court. *Compare* Act of June 25, 1948, ch. 646, 62 Stat. 869, 939, *with* Act of March 3, 1911, ch. 231, 36 Stat. 1087, 1095. In 1980, the provision requiring a specified amount in controversy for district-court federal-question claims was abandoned, with the result that the removal jurisdiction for cases "arising under" federal law permitted them to be removed without consideration of the amount in controversy. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369. Congress has thus shown continuing interest in the removability of cases filed in state court, and particularly cases arising under federal law.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed, and the case remanded for further proceedings in the district court.

Respectfully submitted,

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MARCH 2003

APPENDIX

UNITED STATES CODE ANNOTATED

TITLE 12. BANKS AND BANKING

CHAPTER 2—NATIONAL BANKS

SUBCHAPTER IV—REGULATION OF THE BANKING BUSINESS; POWERS AND DUTIES OF NATIONAL BANKS

Current through P.L. 108-6, approved 02-13-03

§ 85. Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under title 62 of the Revised Statutes. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall

be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

UNITED STATES CODE ANNOTATED

TITLE 12. BANKS AND BANKING

CHAPTER 2—NATIONAL BANKS

SUBCHAPTER IV—REGULATION OF THE BANKING BUSINESS; POWERS AND DUTIES OF NATIONAL BANKS

Current through P.L. 108-6, approved 02-13-03

§ 86. Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred.

UNITED STATES CODE ANNOTATED

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 85—DISTRICT COURTS; JURISDICTION

Current through P.L. 108-6, approved 02-13-03

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

UNITED STATES CODE ANNOTATED

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

Current through P.L. 108-6, approved 02-13-03

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from

which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

UNITED STATES CODE ANNOTATED

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

Current through P.L. 107-377 (End) approved 12-19-02

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to *Rule 11 of the Federal Rules of Civil Procedure* and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be

removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court

determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

Supreme Court, U.S.
FILED
APR 3 2003
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No. 02-306

IN THE

Supreme Court of the United States

BENEFICIAL NATIONAL BANK and
BENEFICIAL TAX MASTERS, INC.,

Petitioners,

v.

MARIE ANDERSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Statutory Provisions Involved	1
Statement of the Case	1
Summary of Argument	3
Argument	5
A. The Burden Is On Defendants To Show That State Law Causes Of Action Are Removable.	5
1. The Jurisdictional Question Must Be Analyzed Pursuant To The Well-Pleaded Complaint Rule.	6
2. No Federal Cause Of Action Appears On The Face Of Plaintiffs' Complaint.	7
B. A Defense To A State-Law Claim Cannot Provide A Basis For Federal Jurisdiction.	9
1. Difference Between Ordinary And Complete Preemption.	10
2. The National Bank Act Does Not Meet The Test For "Field", "Complete" Or "Super" Preemption".	12

Contents

	Page
D. The Effect Of ERISA And The LMRA Highlight The Lack Of Complete Preemptive Power In The National Bank Act.	27
E. Defendant's Position Would Create An Entirely New Type Of Federal Jurisdiction – "Claim Removal".	32
Conclusion	37

TABLE OF CITED AUTHORITIES

	Page
Cases:	
Allis Chalmers Corp. v. Lueck, 105 S. Ct. 1904 (1985)	35
Anderson v. H & R Block, Inc., et al., 287 F.3d 1038 (11th Cir. 2002)	2
Avco v. Aero Lodge No. 735, 88 S. Ct. 1235 (1968)	14, 29, 30, 31
Barnett Bank v. Nelson, 116 S. Ct. 1103 (1996) ...	33-34
BLAB TV of Mobile, Inc. v. Comcast Cable Comm., Inc., 182 F.3d 851 (11th Cir. 1999)	10, 27
Butero v. Royal Maccabees Life Ins. Co., 174 F.3d 1207 (11th Cir. 1999)	17-18
Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614 (1988)	28
Caterpillar, Inc. v. Williams, 107 S. Ct. 2425 (1987)	*passim*
Electrical Workers v. Hechler, 107 S. Ct. 2161 (1987)	11
Farmers & Mechanics' National Bank v. Dearing, 91 U.S. (1 Otto) 29 (1875)	10

Cited Authorities

	Page
First National Bank of Aberdeen v. Aberdeen Nat'l Bank, 627 F.2d 843 (1980)	14
Florence R.R. & Improvement Co. v. Chase National Bank, 17 So. 720 (Ala. 1895)	12
Franchise Tax Board of the State of California Laborers Vacation Trust, 103 S. Ct. 2841 (1983)	*passim*
Great Northern & Co., v. Alexander, 38 S. Ct. 237 (1918)	5
Griffin v. Breckenridge, 91 S. Ct. 1790 (1971)	35
Gully v. First National Bank of Meridian, 57 S. Ct. 96 (1936)	*passim*
Hare, et al. v. H & R. Block and Beneficial, Case No. CV-02-C-C-1848-W	33
Healy v. Ratta, 54 S. Ct. 700 (1934)	6
Helms v. First Alabama Bank, N.A., 386 So. 2d 450 (Ala. 1980)	12
Hunter v. Beneficial National Bank USA, 947 F. Supp. 446 (M.D. Ala. 1996)	33-34
Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478 (1970)	35

Cited Authorities

	Page
Jones v. BankBoston, N.A., 115 F. Supp. 2d 1350 (S.D. Ala. 2000)	21, 22
Lowery v. First National Bank of Oneonta, 196 So. 891 (Ala. 1940)	13
Massachusetts Mut. Life Ins. Co. v. Russell, 105 S. Ct. 3085 (1985)	18
M. Nahas & Co., Inc., 930 F.2d 608 (8th Cir. 1991)	12, 15, 22
Mayor & Alderman of City of Nashville v. Cooper, 73 U.S. 247 (1867)	26
Mercantile Nat'l Bank at Dallas v. Longdeau, 371 U.S. 555 (1963)	15
Merrell Dow Pharmaceuticals, Inc. v. Thompson, 106 S. Ct. 3229 (1986)	9
Metropolitan Life Ins. Co. v. Taylor, 107 S. Ct. 1542 (1987)	*passim*
Monday v. Coast to Coast Wireless Cable, 1997 WL 114874 (M.D. Ala. 1997)	33
National Bank v. Commonwealth, 76 U.S. (9 Wall.) 353 (1869)	34

Page

Nachman Corp. v. Pension Benefit Guaranty Corp., 100 S. Ct. 1723 (1980) 18

Northbrook Nat'l Ins. Co. v. Brewer, 110 S. Ct. 297 (1989) 5

Partin v. Cableview, Inc., 948 F. Supp. 1046 (S.D. Ala. 1996) 34

Puerto Rico v. Russell & Co., 53 S. Ct. 447 (1933) 20

Reno v. American-Arab Anti-Discrimination Committee, 119 S. Ct. 936 (1999) 28

Rush Prudential HMO, Inc. v. Moran, 122 S. Ct. 2151 (2002) 36

Shamrock Oil & Gas Corp. v. Sheets, 61 S. Ct. 868 (1941) 6

Smiley v. CitiBank (S.D.), N.A., 116 S. Ct. 1730 (1996) 10, 23

Smith v. Beneficial National Bank USA, 971 F. Supp. 513 (M.D. Ala. 1997) 34

Smith v. GTE Corporation, 236 F.3d 1292 (11th Cir. 2001) 12

Page

Spellman v. Meridian Bank (Delaware), 1995 WL 764548 ..... 23, 25

Syngenta Crop Protection, Inc. v. Henson, 123 S. Ct. 366 (2002) 5, 6

The Fair v. Kohler Die & Specialty Co., ~~33 S. Ct.~~ 410 (1913) 9

United States Stover Broadcasting Co., 76 S. Ct. 763 (1956) 28

University of South Alabama v. American Tobacco Co., 108 F.3d 405 (11th Cir. 1999) 6

Unum Life Ins. Co. of America v. Ward, 119 S. Ct. 1380 (1999) 11

Video Trax, Inc. v. NationsBank, N.A., 33 F. Supp. 2d 1041 (S.D. Fla. 1998) 26

West Virginia v. Parrish Automobile Training Co., 147 F. Supp. 2d 470 (N.D. W. VA. 2001) 33, 34

Cited Authorities

	Page
Statutes and Rules:	
Code of Alabama (1975), § 8-8-1	1, 9
12 U.S.C. § 24	15
12 U.S.C. § 85	11, 17, 27, 33
12 U.S.C. § 86	11, 17, 33
12 U.S.C. §§ 85-86	15
15 U.S.C. § 1601(a)	35
15 U.S.C. § 1640	35
28 U.S.C. § 1144	18
28 U.S.C. § 1331	15
28 U.S.C. § 1367(c)(3)	28
28 U.S.C. § 1441	6
28 U.S.C. § 1441(a)	5
29 U.S.C. § 1132	17
Other Authority:	
Michael T. Collins, the Unhappy History of Federal Question and Removal, 71 Iowa Law Review 717 (1986)	26

STATUTORY PROVISIONS INVOLVED

In addition to the provisions set forth by Petitioners, Ala. Code § 8-8-1 (1975) is also involved.

STATEMENT OF THE CASE

On or about September 19, 2000, Plaintiff Marie Anderson, and twenty-five (25) other persons, filed a Complaint in the Circuit Court of Barbour County, Alabama, Clayton Division, against defendants H & R Block, Inc. ("H & R Block"), Beneficial National Bank, and Beneficial Tax Masters, Inc. (collectively referred to herein as "Beneficial"). The factual allegations of the Complaint are that Plaintiffs went to H & R Block and were participants in the H & R Block tax refund anticipation loan program. A tax refund anticipation loan is where a taxpayer is given a short term loan from Beneficial in exchange for a pledge of an anticipated tax refund. The allegations of the Complaint are that the interest rate and fees paid by Plaintiffs for the tax refund anticipation loans was higher than the rate disclosed to the plaintiffs, that Defendants utilized unreasonable repayment periods to calculate the interest rate, and that the amount charged for interest was in excess of that allowed by the State of Alabama. The causes of action in the Complaint are for fraud (Count I); suppression (Count II); breach of fiduciary duty (Count III); for the charging of an excessive interest rate under Ala. Code § 8-8-1 (1975) (Count IV); and for violation of the Alabama Mini-Code (Count V).

Defendants removed the case to the District Court for the Middle District of Alabama, asserting complete preemption of Plaintiffs' usury claims (Count IV) under the National Bank Act. On November 22, 2000, Plaintiffs timely filed a Motion to Remand. On December 14, 2000, the District Court entered an

Order denying Plaintiffs' Motion to Remand the case to state court. However, the District Court certified its Order denying Plaintiffs' remand motion for interlocutory appeal to the Eleventh Circuit Court of Appeals. On April 3, 2002, the Eleventh Circuit reversed the District Court's Order denying Plaintiffs' Motion to Remand, and remanded the case for further proceedings consistent with its opinion.

The Eleventh Circuit's opinion, *Anderson v. H&R Block, Inc., et al.*, 287 F.3d 1038 (11th Cir. 2002), recognized that the well-pleaded complaint rule applies where a federal defense is pled in answer to a complaint setting forth exclusively state – law causes of action. The Court held that unless a federal cause of action appears on the face of the complaint, no federal removal jurisdiction exists. *Anderson*, 217 F.3d at 1042. Recognizing that no federal cause of action exists on the face of the Complaint, the Eleventh Circuit went on to analyze whether the exception to the well-pleaded complaint rule for causes of action "completely preempted" applies to the National Bank Act (sometimes referred to herein as the "NBA"). In completing this analysis, the Eleventh Circuit first recognized that complete preemption is "rare", and then held that it did not find in the National Bank Act the requisite indicia of intent that there be such "extraordinary" preemption. *Anderson*, 287 F.3d at 1043, 1047.

Both Beneficial and H & R Block filed Petitions for a Writ of Certiorari with this Court. The Petition for Writ of Certiorari was granted, as to Beneficial National Bank and Beneficial Tax Masters, Inc., on January 24, 2003.

SUMMARY OF ARGUMENT

The limited jurisdiction of the federal courts is only invoked where the face of the complaint states a federal cause of action. This "powerful doctrine" is known as the well-pleaded complaint rule, and is now well-established. *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust*, 103 S. Ct. 2841, 2846 (1983); *Caterpillar, Inc. v. Williams*, 107 S. Ct. 2425, 2429 (1987). No federal cause of action appears on the face of the Complaint in this case, and neither the National Bank Act nor the factual scenario contained in the pleadings in this case, call for abrogation of the well-pleaded complaint rule.

The effect of the well-pleaded complaint rule is that "a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question at issue." *Caterpillar*, 107 S. Ct. at 2430. Despite the clear direction of this Court, that is exactly what Defendants attempt to do in this case – remove a case containing only state law causes of action based upon a federal defense that they have injected into the case.

The well-pleaded complaint rule does not affect a defendant's ability to present a federal defense as a matter of ordinary preemption. What the well-pleaded complaint rule does do is prevent a defendant from creating federal jurisdiction at its whim, as opposed to following the concrete rule that the federal claim must be on the face of the complaint, and that a plaintiff is the master of his or her complaint. *Caterpillar Id.* Faced with this authority, Defendants seek to fit the National Bank Act within a very

narrow exception to the well-pleaded complaint rule – an exception referred to as "complete" or "field" preemption. Complete preemption has been recognized in only two instances: Claims brought to construe the terms of a collective bargaining agreement (LMRA); and claims relating to an employer provided benefits plan (ERISA). However, both of these comprehensive, reticulated, federal statutory schemes contain indicia of specific congressional intent that they create removal jurisdiction. Not only is there no such congressional intent under the National Bank Act, but this Court has already held that setting forth a defense of preemption under the National Bank Act to state law claims does not create removal jurisdiction. *Gully v. First National Bank of Meridian*, 57 S. Ct. 96 (1936).

The reason that the National Bank Act does not create removal jurisdiction is that, unlike ERISA or LMRA, where, "state law does not exist as an independent source of private rights to enforce collective bargaining contracts [or ERISA plan benefits]." *Caterpillar*, 107 S. Ct. at 2431, quoting *Avco*, state law does create an independent source of private right to be free from usurious interest rates. There is an independent source of a private right to be free from excessive interest created by Alabama law that has been pled in this case. That is the Alabama usury statute. If there were no federal law to interpose as a defense, it could not be said in any way, shape, or form, that a claim under the Alabama usury statute arises under the constitution or laws of the United States. Indeed, were this a claim against a national bank chartered in Alabama by an Alabamian, there would be no question that the source of the private right to be vindicated in a claim under the National Bank Act would be Alabama law. This is in direct contradiction to the source of private rights to be vindicated in claims brought for benefits under an

ERISA plan, or to enforce the terms of a collective bargaining agreement, which are creatures of federal law.

Lastly, Defendants have specifically stated that they wish to narrowly confine their new species of removal jurisdiction under the NBA to usury claims only. If Defendants' proposed scheme were to play out, this would result in the dismissal of the usury claim, and, absent an amendment bringing a claim under the National Bank Act, a case in federal court with no independent jurisdictional basis. Again, this would be an extension of existing law not contemplated by the statutory scheme in place since 1887. *Franchise Tax Bd.*, 103 S. Ct. at 2846. Defendants' insertion of the National Bank Act in this case is nothing more than a defense to state law claims, and under this Court's long held and well-reasoned precedent, the bounds of jurisdiction do not allow for such.

ARGUMENT

A. The Burden Is On Defendants To Show That State Law Causes Of Action Are Removable.

Removal jurisdiction, of course, is "limited to such actions which could have been brought originally in federal courts." *Northbrook Nat'l Ins. Co. v. Brewer*, 110 S. Ct. 297, 300 (1989); 28 U.S.C. § 1441(a). The limited right of removal, which did not exist at common law, and is not mentioned in the Constitution, "is entirely a creature of statute and 'a suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress.'" *Syngenta Crop Protection, Inc. v. Henson*, 123 S. Ct. 366, 369 (2002), quoting *Great Northern & Co. v. Alexander*, 38 S. Ct. 237 (1918). Moreover, it is clearly

established that the party asserting removal jurisdiction has the burden to show that some act of Congress strictly applies. *University of South Alabama v. American Tobacco Co.*, 108 F.3d 405, 411-12 (11th Cir. 1999); *Sygenta, supra* ("These statutory procedures for removal are to be strictly construed."); *Shamrock Oil & Gas Corp. v. Sheets*, 61 S. Ct. 868, 872 (1941) (policy underlying removal statutes "is one calling for the strict construction of such legislation.") *Healy v. Ratta*, 54 S. Ct. 700, 703 (1934) ("Due regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defied.")

1. The Jurisdictional Question Must Be Analyzed Pursuant To The Well-Pleaded Complaint Rule.

In this case, diversity is not an issue. The question is whether Plaintiffs' claims "arise under" the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1441. That question must be answered by reference to the well-pleaded complaint rule. The well-pleaded complaint rule has been succinctly set forth by this Court.

> One powerful doctrine has emerged, however – the "well-pleaded complaint" rule – which as a practical matter severely limits the number of cases in which state law "creates the cause of action" that may be initiated in or removed to federal district court, thereby avoiding more-or-less automatically a number of potentially serious federal-state conflicts.
>
> "[W]hether a case is one arising under the Constitution or a law or treaty of the United States,

> in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson*, 234 U.S. 74, 75-76, 34 S. Ct. 724, 724, 58 L. Ed. 1218 (1914).

Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust, 103 S. Ct. 2841, 2846 (1983). "For better or worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case 'arises under' federal law." *Id.* (emphasis in original).

2. No Federal Cause Of Action Appears On The Face Of Plaintiffs' Complaint.

It is clear that no federal claim is pleaded on the face of the Complaint in this case. The Complaint sets forth the underlying factual allegations outlining the refund anticipation loan process, and then states that the interest charges "were knowingly assessed by the Defendants and are in excess of the legal limit on interest rates allowed under Alabama statute and the common law doctrine of usury . . ." (Complaint, ¶ 36). The Complaint then recounts the misrepresentations and suppressions of Defendants.

> 39. Defendants misrepresented material facts to the Plaintiffs which facts include, but are not limited to, the following:
> (a) the interest rate paid by the Plaintiffs exceeded the rate disclosed to the plaintiffs.

(b) the Plaintiffs fee and interest rate would be substantially higher than the rate disclosed due to the Defendants' receipt of loan repayments.
(c) the Defendants utilized unreasonable repayment periods to calculate the interest rate.

* * *

45. The material facts which the Defendants withheld, concealed, and suppressed from Plaintiff include, but are not limited to, the following:
(a) the interest rate paid by the Plaintiffs exceeded the rate disclosed to the plaintiffs.
(b) the Plaintiffs fees and interest rate would be substantially higher than the rate disclosed due to the Defendants' receipt of loan repayments.
(c) the Defendants utilized unreasonable repayment periods to calculate the interest rate.

(Complaint, ¶¶ 39, 45). Finally, in terms of factual pleading, the Complaint sets forth the facts outlining Defendants' breaches of fiduciary duty to Plaintiffs (Complaint, ¶¶ 51-57).

The facts in the Complaint support the following causes of action *all pled under Alabama law*: Intentional Misrepresentation (fraud) (Count I); Suppression (Count II); Breach of Fiduciary Duty (Count III); Usury (Count IV); and Violation of the Alabama Mini-Code (Count V). The only

cause of action Defendant argues provides any basis for removal jurisdiction is Count IV, which is clearly pled as a violation of the Alabama common law usury doctrine, and Ala. Code § 8-8-1. Under the well-pleaded complaint rule, there is no jurisdiction.

B. A Defense To A State-Law Claim Cannot Provide A Basis For Federal Jurisdiction.

The well-pleaded complaint rule

> makes the plaintiff master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law . . . [and] it is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.

Caterpillar, Inc. v. Williams, 107 S. Ct. 2425, 2429, 2430 (1987), citing, *Franchise Tax Bd.*, 103 S. Ct. at 2847, 48. *The Fair v. Kohler Die & Specialty Co.*, 33 S. Ct. 410, 411 (1913) ("Of course, the party who brings suit is master to decide what law he will rely upon.")[1]; *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 106 S. Ct. 3229, 3233 (1986) ("Jurisdiction may not be sustained on a theory that

1. Defendants and Defendants' *amici* make the argument that a party may not avoid federal jurisdiction by "artful pleading." (Petitioner's Brief, p. 15). The law is clear that a plaintiff may eschew federal claims in order to keep a case in state court if that is plaintiff's wish.

the plaintiff has not advanced."). Because the plaintiff is the master of his complaint, and under the statutory framework giving rise to the well-pleaded complaint rule, it is firmly established that a defense based in federal law cannot provide federal jurisdiction.

Despite the clear precedent that a federal defense to a state law claim will not confer federal removal jurisdiction, this is precisely what Defendants seek to do. The cases cited by Defendant for the proposition that federal law governs claims against National Banks, from *Farmers & Mechanics' National Bank v. Dearing*, 91 U.S. (1 Otto) 29 (1875); to *Smiley v. CitiBank (S.D.), N.A.*, 517 U.S. 735 (1996) stand for nothing more than the proposition that usury claims under state statutes are subject to ordinary preemption. Preemption of a state law claim does not give rise to removal jurisdiction.

1. Difference Between Ordinary And Complete Preemption.

Ordinary preemption is a defense that may be raised in a state court, as well as in federal court. As a defense, ordinary preemption does not appear in the plaintiff's well-pleaded complaint, and thus does not give the defendant the ability to remove a case to federal court. *Caterpillar, Inc.*, 482 U.S. at 393. Unlike the defense of ordinary preemption, the doctrine of complete preemption gives a defendant the ability to remove the case to federal court. *BLAB TV of Mobile, Inc. v. Comcast Cable Comm., Inc.*, 182 F.3d 851, 854 (11th Cir. 1999).

The Supreme Court has found complete preemption under only two federal statutory schemes: Claims founded

"directly on rights created by collective bargains agreements . . . [or] substantially dependent on analysis of a collective bargaining agreement." *Caterpillar*, 107 S. Ct. at 2431, quoting *Electrical Workers v. Hechler*, 107 S. Ct. 2161, 2166-67 n.3 (1987); and claims for benefits provided under an ERISA plan. *Unum Life Ins. Co. of America v. Ward*, 119 S. Ct. 1380 (1999).

In *Metropolitan Life Ins. Co. v. Taylor*, 107 S. Ct. 1542 (1987), the Supreme Court cautiously extended the doctrine of complete preemption to ERISA § 502(a) claims. However, the doctrine of complete preemption applies only where Congress has "clearly manifested an intent" to make a particular cause of action removable to a federal court. *Metropolitan Life Ins. Co.*, 107 S. Ct. at 1548. The *Metropolitan Life* Court explained the difference between ordinary and complete preemption as such:

> Federal preemption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court. *Gully v. First National Bank*, 299 U.S. 109 (1936). One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely preempt a particular area that any civil complaint raising the select group of claims is necessarily federal in character. For twenty years, this Court has singled out claims preempted by § 301 of the LMRA for such special treatment.[2]

2. Defendants' concern that somehow they are without the ability to use their ordinary preemption defense in the Alabama state courts is unfounded. Alabama courts have a long history of applying the doctrine of ordinary preemption to §§ 85 and 86 of the National (Cont'd)

Metropolitan Life, 107 S. Ct. at 1546. In *Metropolitan Life*, the Court citing clear legislative history noted that, "Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) [of ERISA] removable to federal court." *Id.* at 1548. However, there is no similar "clearly manifested of intent" to make causes of action within the scope of the National Bank Act removable to federal court. Indeed, even the opinion in *M. Nahas & Co., Inc.*, 930 F. 2d 608, 611 (8th Cir. 1991), the Circuit Court opinion Defendants pointed to in arguing that there was a split in the Circuits, recognizes that National Banks have been denied removal, "even though the National Bank Act would ultimately control all or part of plaintiff's state law action."

2. The National Bank Act Does Not Meet The Test For "Field", "Complete" Or "Super" Preemption".

Both this Court, and the Eighth Circuit, see *supra*, have held that the National Bank Act does not occupy the field of banking regulation to the extent that it completely preempts state law claims against National Banks dealing with subject matter covered by regulation. In *Gully v. First National Bank of Meridian*, 57 S. Ct. 96 (1936), the Court considered whether a claim by the tax collector for the State of Mississippi against a national bank was preempted because, "the power to lay a tax upon the shares of national banks has its origin and measure in the provisions of the federal statute

(Cont'd)

Bank Act where warranted. *Helms v. First Alabama Bank, N.A.*, 386 So. 2d 450 (Ala. 1980); *Florence R. R. & Improvement Co. v. Chase National Bank*, 17 So. 720 (Ala. 1895). Simply put, the denial of federal jurisdiction does not preclude the defense of preemption. *Smith v. GTE Corporation*, 236 F.3d 1292 (11th Cir. 2001).

. . . and that by necessary implication a plaintiff counts upon the statute in suing for the tax." *Gully*, 57 S. Ct. at 97. This Court disagreed, stating:

> Petitioner will have to prove that the state law has been obeyed before the question will be reached whether anything in its provisions or in administrative conduct under it is inconsistent with the federal rule. The most one can say that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, to far removed form plain necessity, is unavailing to extinguish the jurisdiction of the states.

Gully, 57 S. Ct. at 99-100. Similarly, the Alabama usury claim, if it survives to be a claim at all, is brought under Alabama substantive law. The fact that there may be a federal defense to the claim does not grant the federal courts jurisdiction.[3]

3. Defendant casts doubt upon whether the Alabama Courts, including the Alabama Supreme Court, will follow ordinary preemption law (Petitioner's Brief, pp. 31, 36). The notion that jurisdiction can be based upon a fear that Alabama state courts will not follow the law of ordinary preemption was rejected by this Court in *Franchise Tax Bd., supra*, at 2848 n.12 ("If the state courts reject a claim of federal preemption, that decision may ultimately be reviewed on appeal by this court."). Moreover, that assertion does not square with the experience of the Alabama state courts, who have applied the preemptive force of the National Bank Act when applicable. *See Lowery v. First National Bank of Oneonta*, 196 So. 891 (Ala. 1940).

Following *Gully*, the Eighth Circuit in *First National Bank of Aberdeen v. Aberdeen National Bank*, 627 F.2d 843 (1980), where a national bank argued that NBA preemption created removal jurisdiction, held that while the assertion of the NBA to a state law claim may provide a complete defense based on ordinary preemption, "we are not persuaded that the Supreme Court in *Avco* intended to invalidate the generally accepted principle that defensive assertion of federal preemption in response to a state law claim may not constitute a ground for removal." *First National Bank of Aberdeen*, 627 F.2d at 853.

The Supreme Court has already held that the National Bank Act does not provide removal jurisdiction merely because it provides a defense to a state law claim. *See Gully supra*. Given this ruling, and based upon the statutory framework as it has existed since 1887, *Franchise Tax Bd.*, 103 S. Ct. at 2847 ("since 1887 it has been settled that a case may not be removed to federal court on the basis of a federal defense, even the defaults of preemption"), Defendant is left to argue that claims brought against national banks are subject to the extremely limited doctrine of "field" or "complete" preemption.

In order for there to be complete preemption, the preemptive force of a federal statute must be "so powerful" as to "displace entirely any state cause of action." In the LMRA context, the Courts have held that Congress intended to preempt any cause arising out of an employer/employee relationship covered by a collective bargaining agreement. This complete preemption power in the LMRA context has been stated in the following terms. "The necessary ground of decision [in *Avco*] was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action

'for violation of contracts between an employer and a labor organization.'" *Franchise Tax Bd*, quoted in *Metropolitan Life*, *supra*. It is clear that the National Bank Act does not displace entirely any cause of action between a person and a national bank where the National Bank Act is implicated. *See M. Nahas*, *First National Bank of Aberdeen*, *Gully*, *supra*. The doctrine of complete preemption simply does not apply.

The text of the NBA shows that it was intended that national banking associations could be sued in the state courts. When Congress replaced the 1863 Act in 1864, the statutory language provided, "Suits, actions and proceedings, against any association under this act, may be had in any circuit, district, or territorial court . . . or in any state county, or municipal court in the county or city in which said association is located . . ." *Mercantile Nat'l Bank at Dallas v. Longdeau*, 371 U.S. 555 (1963), citing 13 Stat. 116-17. Even today, the Act at 12 U.S.C. § 24 states that a National Association shall have the power, "To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." 12 U.S.C. § 24. Clearly, it was not the intent of Congress when the National Bank Act was enacted, nor is it the intent today, that national banking associations only be subject to suit in the federal courts.

The subsections of the National Bank Act that are at issue in the present case were initially enacted as § 30 of the National Bank Act of 1864, which is now codified at 12 U.S.C. §§ 85-86[4], and read as follows:

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4. Sections 85 and 86 were enacted into law by Congress *before* the existence of federal jurisdiction as enacted under 28 U.S.C. § 1331. The first version of § 1331 was enacted on March 3, 1875, ch. 137, § 1, 18 Stat. 470. *Franchise Tax Bd.*, 103 S. Ct. at 2845.

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, **interest at the rate allowed by the laws of the State**, Territory or District where the bank is located, or at a rate of one per centum in excess of the discount rate on 90-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where the laws of any State a different rate is limited for banks organized under state laws, if the rate so limited shall be allowed for associations organized or existing in any such state under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve or charge a rate not exceeding 7 per centum, or one per centum in excess of the discount rate on 90-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States or a District of Columbia shall be at the rate allowed by the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. At the purchase, discount, or sale of a bonafide bill of exchange, payable to another place than the place of such purchase, discount, or sale, at not more

than the current rate of exchange per site drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

12 U.S.C. § 85 (emphasis added).

> The taking, receiving, reserving, or charging a rate of interest greater than is allowed by § 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: provided, that such action is commence within two years from the time the usurus transaction occurred.

12 U.S.C. § 86.

The National Bank Act, 12 U.S.C. § 85, vests the *states* with the authority to legislate and establish interest rate limitations. As such, it is highly unlikely that Congress intended to confer complete federal preemption through the adoption of the laws of the several states. *See Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207 (11th Cir. 1999) (super preemption applies when Congress comprehensively occupies a field of law and is necessarily federal in character). With the enactment of ERISA, Congress created "a comprehensive remedial scheme in 29 U.S.C. § 1132 for loss or denial of employee benefits." *Butero*, 174

F.3d 1207, 1211 (11th Cir. 1999), citing, *Metropolitan Life*, *supra*, at 1546. With regard to ERISA, its "legislative history indicates, that, in light of the act's virtually unique preemption provision, *see* § 514, 28 U.S.C. § 1144, 'a body of federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." *Franchise Tax Bd.*, 103 S. Ct. at 2854 n.26 quoting 120 Cong. Rec. 29,942 (1974) (Sen. Javits). There is no federally created substantive right created by the NBA. The NBA merely states which states' laws with regard to usury will apply. Far from envisioning a comprehensive federal scheme like ERISA or the LMRA, the NBA merely creates priority for one state's laws over another. As such, Defendants' arguments for "uniformity" ring hollow, and are clearly distinguishable from ERISA and LMRA enforcement actions.

Both the ERISA, and the LMRA, present a unique, *federally created* "interlocking inter-related, and interdependent remedial scheme," *Massachusetts Mut. Life Ins. Co. v. Russell*, 105 S. Ct. 3085, 3092 (1985), which is part of a "comprehensive and reticulated statute." *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 100 S. Ct. 1723, 1726 (1980). The NBA creates no such comprehensive federal body of law, it merely prioritizes substantive rights created by the statutes of the several states.[5]

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5. Defendants' arguments that complete preemption exists due to the provision of a federal remedy falls short of the mark also. This Court in *Caterpillar*, *supra*, specifically rejected the argument that the provision of a federal remedy plays any role in complete preemption analysis.

> The Court of Appeals also appears to have held that a case may not be removed to federal court on the ground
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> (Cont'd)

In this case, Defendants argue that the laws of Delaware control the loan interest rate, rather than the laws of Alabama, where the loans were issued. On the other hand, it is clear that the National Bank Act would *not* preempt or otherwise apply to an interest rate claim by an Alabama consumer against an Alabama bank. The same is true with any Delaware

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> that it is completely pre-empted unless the federal cause of action relied upon provides the plaintiff with a remedy. For example, the court stated:
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> "[A] state law cause of action has been 'completely pre-empted' when federal law both displaces and supplements the sate law – that is, when federal law provides both a superceding remedy replacing the state cause of action and preempts that state law cause of action. These are two distinct inquiries, both of which must be satisfied to permit removal of an action to federal court." 786 F.2d at 932 (emphasis in original; citations omitted). This analysis is squarely contradicted by our decision in *Avco Corp. v. Machinist*, 390 U.S. 557, 88 S. Ct. 1235, 20 L. Ed. 2d 126 (1968). We there held that a § 301 claim was properly removed to federal court although, at the time, the relief sought by the plaintiff could be obtained only in state court. We reasoned as follows: "The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy. . . . [T]he breadth or narrowness of the relief which may be granted under federal law in § 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter." *Id.*, at 561, 88 S. Ct. at 1237-1238. Thus, although we affirm the Court of Appeals judgment, we reject its reasoning insofar as it is inconsistent with *Avco*.
>
> *Caterpillar*, 107 S. Ct. at 2429 n.4.

consumer against a Delaware bank. This in itself illustrates that the National Bank Act does not displace the field of state interest rate regulation.

Defendants argue that the National Bank Act completely preempts because any claim for excessive usury must be made pursuant to the federal Act. *Gully* instructs that the National Bank Act does not provide federal jurisdiction on those grounds. In *Gully*, the defendant made the same argument with regard to the exclusivity of the federal cause of action as is made in this case. The *Gully*, defendant argued, "that a federal controversy exists, the tax being laid upon a national bank or upon the shareholders therein, and for that reason being void unless permitted by the federal law." *Gully*, 57 S. Ct. at 98-99. The Court rejected the argument.

> "The federal nature of the right to be established is decisive – not the source of the authority to establish it." Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. *Louisville & Nashville R. Co. v. Mottley*, *supra*. With no greater reason can it be said to arise thereunder because permitted thereby.

Gully, 57 S. Ct. at 99, quoting, *Puerto Rico v. Russell & Co.*, 53 S. Ct. 447, 449 (1933). Similarly, the fact that a claim for usury is only permitted by reference to the federal law does not make a claim under a state statute for usury federal in nature, it only provides a defense thereto.

In a thorough analysis of precedent on the issue, the United States District Court for the Southern District of Alabama ruled that the National Bank Act *does not* confer complete preemption over state law claims for excessive interest. In *Jones v. BankBoston, N.A.*, 115 F. Supp. 2d 1350 (S.D. Ala. 2000), the Court engaged in a significant analysis of the Congressional intent and history of the National Bank Act.

> [T]he significance to complete preemption analysis of jurisdictional language paralleling that of the LMRA is dependent on whether the jurisdictional language was enacted after the 1968 *Avco* decision; only then may it be inferred that Congress, by its use of such language, desired to mimic the complete preemption embedded in the LMRA. Because the National Bank Act's jurisdictional provision was enacted a century before *Avco*, it cannot be construed as an effort to invoke complete preemption by parallelism . . . Even if closely parallel jurisdictional language carried any significance with respect to statutes enacted before 1968, the National Bank Act's jurisdictional provision does not closely parallel that of the LMRA.

The most striking difference between the National Bank Act and the LMRA, however, lies in their treatment of state court jurisdiction; while the LMRA is silent, the National Bank Act expressly contemplates state court jurisdiction. Thus the National Bank Act's jurisdictional provision varies materially in every respect from the jurisdictional language common to the LMRA and

> ERISA. Such a jurisdictional provision cannot be said to "closely parallel" the LMRA for purposes of complete preemption analysis.

Jones, 115 F. Supp. 2d at 1358. The *Jones* Court went on to analyze the faulty reasoning of the *M. Nahas* decision.

> The Eighth Circuit's reliance on the existence of an "exclusive federal remedy" without any further showing of congressional intent is not only inconsistent with *BLAB TV*, by which this Court is bound, but also appears to contradict *Metropolitan Life v. Taylor* itself . . . were the existence of an "exclusive federal remedy" the only requirement for complete preemption, the *Metropolitan Life* Court would have concluded its analysis at this point and declared the Plaintiffs' claims completely preempted. Rather than doing so, the Court noted it would be "reluctant" to grant complete preemption on so slender a basis and instead launched into its explication of the statute and its legislative history. . . . This Court is aware of no other appellate court utilizing the Eighth Circuit's lenient test for complete preemption and is neither empowered nor inclined to adopt it.

Jones, 115 F. Supp. 2d at 1356 (citations omitted in original).

In *Metropolitan Life Ins. Co.*, the Supreme Court held that express statutory language and Congressional intent to displace entirely any state cause of action was *required* for the application of the doctrine of complete preemption. The Court examined the language of the jurisdictional subsection of ERISA's civil enforcement provisions and

determined that Congress had clearly manifested an intent to make state causes of action removable to federal court. *Metropolitan Life*, 107 S. Ct. at 1547. The Supreme Court clarified its holding on complete preemption by stating that:

> [E]ven with a provision such as [ERISA] § 502(a)(1)(B) that lies at the heart of a statute with the unique pre-emptive force of ERISA, however, we would be reluctant to find that extraordinary preemptive power, such as has been found with respect to § 301 of the L.M.R.A., that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded Complaint rule.

Metropolitan Life, 481 U.S. at 65, 107 S. Ct. at 1547 (internal citations omitted).

The Third Circuit, in the case of *Spellman v. Meridian Bank (Delaware)*, 1995 WL 764548,[6] explained the Supreme Court precedent as to complete preemption in words far more elegant than this writer could summon.

> The Supreme Court has held affirmative evidence of Congressional intent could be the touchstone

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6. The *Spellman* opinion is available as a 1995 Westlaw cite, and was not published in the Federal Reporter. Following the panel opinion, the Third Circuit voted to grant rehearing *en banc* and vacated the panel opinion. The appeal was dismissed before any *en banc* opinion was issued. The appeal was dismissed in July of 1996 pursuant to the Supreme Court's ruling in *Smiley v. CitiBank*, 517 U.S. 735 (1996) which involved a technical definition of "interest" and did not involve the issue of complete preemption. It is cited merely because the language is clear, and sets forth succinctly the distinction between ERISA and the LMRA on one hand, and the National Bank Act on the other.

of the federal district court's removal jurisdiction and, as discussed above, the court has found such intent only rarely. The complete preemption doctrine was originally rooted in a cause of action arising under § 301 of the L.M.R.A. The court extended the doctrine reluctantly, in *Metropolitan Life*, to an action arising under ERISA. The court wrote that it did so only because "ERISA's civil enforcement provisions closely parallels [sic] that of § 301 of the L.M.R.A.," and because explicit language in the ERISA Conference Report analogized the ERISA provision to the L.M.R.A. language. In the absence of explicit direction from Congress, the court wrote:

> [e]ven with a provision such as 502(a)(1)(B) [the jurisdictional provision] that lies at the heart of a statute with the unique pre-emptive force of ERISA . . . we would be reluctant to find that extraordinary pre-emptive power, such as that has been found with respect to 301 of the L.M.R.A., that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.

Neither the National Bank Act nor DIDA contains a jurisdictional provision evidencing Congressional intent to permit removal of the sort relied upon in *Avco* and *Metropolitan Life*. Nor have the banks pointed to Congressional language suggesting that parties may bring suit against banks in federal court without regard to the citizenship of the parties or the amount in controversy.

> Congressional intent to permit removal based on complete preemption would be difficult to divine from the legislative history of the National Bank Act, because the act was passed in 1864, pre-dating federal question jurisdiction, the well pleaded complaint rule, and the doctrine of complete preemption. The banks argue, nonetheless, that Congress evidenced an intent to provide an exclusive source of relief for claims of overcharge that, coupled with the general federal provision allowing for removal of federal question cases, demonstrates Congressional intent to allow removal. However, the defendants point to nothing in the legislative history of §§ 85 and 86 that present the sort of clear indication of Congressional intent we have looked for in the past.

Spellman, 1995 WL 764548, *6-7 (internal quotations omitted).

The requirements specifically articulated by the Supreme Court are not met in this case – there is neither statutory language nor Congressional intent for the proposition that the National Bank Act displaces entirely Plaintiffs' state law causes of action.[7] Further examination of the absence of

7. Defendants' assertion that congressional intent cannot possibly be gleaned as to removal under the National Bank Act because it was enacted before general federal question jurisdiction, and before removal was allowed, is not true. First, when Congress enacted the National Bank Act in 1864, it provided that suit could be brought in federal or state court. *See supra*. Moreover, had the Congress wished to provide for removal of suits under the National Bank Act, it could have done so. At the time, Congress had provided

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complete preemption in the National Bank Act by the District Court for the Southern District of Florida has held that banking is not an area in which Congress has evidenced an intent to occupy the entire field to the exclusion of the states, and thus state legislatures may legislate in all areas not expressly or impliedly preempted by federal legislation. *Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp. 2d 1041 (S.D. Fla. 1998).

> The determination of the maximum amount of interest which may be charged for the use of money loaned has always been within the police power of the state, and the details of the exceptions to the legislation have rested within the discretion of the state legislature. In § 85 of the Bank Act, Congress expressly and unambiguously stated that a national bank was subject to the interest provision of the laws of the state in which the bank was located.

Video Trax., 33 F. Supp. 2d at 1050 (internal citations omitted).

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in a handful of civil acts that federal law would both provide a defense, and for removal of a cause of action from state to federal court. *See, e.g.*, Act of March 3, 1863, 12 Stat. 755 (amended by the Act of May 11, 1866, 14 Stat. 46), Congress provided for a federal defense and provided the right of removal of civil or criminal actions arising out of acts committed under federal authority during the Civil War. *See Mayor & Alderman of City of Nashville v. Cooper*, 73 U.S. 247 (1867); *Michael T. Collins, the Unhappy History of Federal Question and Removal*, 71 Iowa Law Review 717, 720-21 (1986). Simply put, had Congress, at the time, it intended that suits arising out of the National Bank Act be litigated only in the federal courts, Congress had the ability to provide for such extraordinary jurisdiction. It chose not to do so with regard to the National Bank Act.

There is no question that interest rates are determined by state law. There is no legislative language evidencing Congressional intent that state-law actions relating to interest rate claims against national banks are to be considered as arising under federal law for purposes of removal jurisdiction. There is no indication that the National Bank Act's jurisdictional language is intended to function in the same manner of Section 301 of the LMRA, or § 502(a) of ERISA, pursuant to the guidance of the Supreme Court in *Metropolitan Life*. *See BLAB TV*, 132 F.3d at 857. Defendants cannot extrapolate the doctrine of complete preemption and claim that the laws of the State of Delaware, through the application of 12 U.S.C. § 85 and "super preemption", create federal subject matter jurisdiction.

At best, the provisions of the National Bank Act only create a defense based upon the factual application of interest regulations between the several states and relies on interpretation of the *laws of a particular state*. Removal is simply improper where a case cannot be "removed on the basis of a federal defense, including the defense of preemption." *Caterpillar*, 107 S. Ct. at 2429.

D. The Effect Of ERISA And The LMRA Highlight The Lack Of Complete Preemptive Power In The National Bank Act.

Not only is there a lack of any manifest intent showing that field preemption is proper, but the practical effect of what Defendants request shows that the National Bank Act cannot support removal jurisdiction based upon complete or field preemption. The Complaint in this case asserts causes of action under Alabama state law for fraud, suppression, breach of fiduciary duty, and violation of the Alabama Mini-

Code, in addition to the state law usury claim. Not even Defendants argue that these causes of action somehow confer removal jurisdiction. However, Defendants' plan would eventually leave these claims in federal court with no jurisdictional basis.

Assuming *arguendo* that the National Bank Act preempts the state law usury claims under the principles of ordinary preemption shows the folly of Defendants position. If a district court were to take jurisdiction over such a case, and then dismiss the usury claim, unless there were amendment to include a federal usury claim, only two scenarios are possible: either (1) the district court would remand the case for lack of jurisdiction[8], or (2) the case would remain in federal court with no independent jurisdictional basis. The latter alternative is possible, but not likely, *See* note 8, *supra*, where a district court has a duty to examine its jurisdiction, and remand a case, *sua sponte* if necessary, lacking federal jurisdiction. *Reno v. American-Arab Anti-Discrimination Committee*, 119 S. Ct. 936, 945 n.10 (1999); *United States v. Stover Broadcasting Co.*, 76 S. Ct. 763, 772 (1956).

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8. Plaintiff recognizes that a district court has the authority to retain such cases under its supplemental jurisdiction, 28 U.S.C. § 1367(c)(3). However, given that the only "federal" claim would normally, as in this case, be the subject of a motion on the pleadings early in the case, it seems that such cases should be remanded *Carnegie-Mellon Univ. v. Cohill*, 108 S. Ct. 614, (1988) ("In the usual case in which all federal law claims are eliminated before trial, the balance of the factors to be considered under the pendant jurisdiction doctrine, judicial economy, convenience, fairness, and comity will point toward declining to exercise jurisdiction over the remaining state law claims.")

The certainty of a case in federal court with no independent, jurisdictional basis if Defendants' scenario plays out, stands in stark contrast to the scenario when the unique field preemptive power contained in ERISA and the LMRA are applied. In *Avco v. Aero Lodge No. 735*, 88 S. Ct. 1235 (1968), the doctrine of complete or field preemption was established in a case brought to construe language in a collective bargaining agreement subject to the LMRA.[9]

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9. In a show of just how "extraordinary" a doctrine complete preemption is, the *Caterpillar* Court, in a case argued the same day, and decided only two months after complete preemption was extended to ERISA claims, *see Metropolitan Life Ins. Co. v. Taylor*, further circumscribed the doctrine of complete preemption. In *Caterpillar*, employees made state law claims for breach of contract relating to statements made to them while they were managerial employees, where the employees later were downgraded to positions covered by a collective bargaining agreement. The Court held that the claims were brought pursuant to state law, and remanded the case, despite the fact that the action could have been brought pursuant to the collective bargaining agreement under § 301 of the LMRA. *Caterpillar*, 107 S. Ct. at 2431. ("It is true that respondents, bargaining unit members at the time of the plant closing, possessed substantial rights under the collective agreement, and could have brought suit under § 301. As masters of the complaint, however, they chose not to do so.") Similarly, while Plaintiffs in this case could have brought federal usury claims, they chose not to do so. They brought a claim which may well be subject to a federal defense, but this does not create jurisdiction under the removal statute. As the *Caterpillar* Court stated,

> But a *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state law claim, transform the action with one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If a defendant could do so, the plaintiff would be master of nothing.

Caterpillar, 107 S. Ct. at 2433.

The Court held that, because the action was brought to construe a "no strike" clause within the collective bargaining agreement covered exclusively by the LMRA, it was an action brought pursuant to the LMRA, and therefore, the claim itself, arose under a federal statute. As explained by the *Franchise Tax Bd., Court*:

> The necessary ground of decision [in *Avco*] was that the preemptive force of § 301 is so powerful as displace entirely any state cause of action 'for violation of contracts between and employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of 1301,

Franchise Tax Bd., 103 S. Ct. at 2853.

The underpinning for the lone extension of the complete preemption doctrine, to ERISA actions, which the Court "reluctantly" made, *Metropolitan Life*, 107 S. Ct. at 1547, is the expressed legislative intent that actions to enforce ERISA rights "arise under" the laws of the United States. The *Metropolitan Life* Court cited the following ERISA legislative history:

> [W]ith respect to suits to enforce benefit rights under the plan of to recover benefits under he plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those

> courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 if the Labor-Management Relations Act of 1947.

4. R. Conf. Rep. No. 93-1280, p. 327 (1974), quoted in *Metropolitan Life*, 107 S. Ct. at 1547. There is no such unequivocal legislative history regarding the NBA. This is particularly compelling where the Court stated the crucial nature of clear legislative history.

The clear distinction between ERISA/LMRA preemption and NBA ordinary preemption is that, "state law does not exist as an independent source of private rights to enforce collective bargaining contracts [or ERISA plan benefits]". *Caterpillar*, 107 S. Ct. at 2431, quoting *Avco Corp. v. Machinists*, 376 F.2d 337, 340 (6th Cir. 1967), *aff'd Avco*, *supra*. In other words, there is no independent cause of action to enforce the terms of a collective bargaining agreement or an ERISA plan. Such rights do not exist but for the federal statutory schemes creating uniquely federal private rights of action. However, there is an independent cause of action for usurious interest based upon Alabama law, not referable in the least to any federal statute. This was the holding in *Gully*, *supra*.

> If there were no federal law permitting the taxation of share in national banks, a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense. *Tennessee v. Union &*

> *Planters' Bank, supra*; *Sawyer v. Kochersperger*, 170 U.S. 303, 18 S. Ct. 946, 42 L. Ed. 1046; *Arkansas v. Kansas & Texas Coal Co.*, 183 US. 185, 22 S. Ct. 47, 46 L. Ed. 144; *Louisville & Nashville R. Co. v. Mottley, supra*. That there is a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid.

Gully, 57 S. Ct. at 99. If there were no federal law preempting state usury claims, a suit for usury under the Alabama statutes would not arise under the Constitution of the United States. If there were no ERISA or LMRA, however, there would be no ERISA or LMRA enforcement actions. The fact that there may be a federal law preempting such a claim does not change the basis of the suit, which is still grounded in Alabama law.

E. Defendant's Position Would Create An Entirely New Type Of Federal Jurisdiction – "Claim Removal".

Not even Defendants take the position that all claims implicating the National Bank Act are preempted. ("But Petitioners do not claim that all cases against national banks, or all cases in which the National Bank Act may be implicated, are removable.")[10] (Petitioner's Reply Brief to

10. Defendants further maintain that their preemptive focus is narrowly confined to usury claims. "[W]hat they [Petitioners] do maintain, and what is at issue here, is that suits for usury on the part of national banks are removable." (Petitioners' Opposition to Cert. Brief, p. 5). This statement, and Defendants' true intentions, are belied by their practice. Any question that what Defendants seek to

(Cont'd)

Petition for Writ of Certiorari, p. 5). They cannot take this position because of the authorities holding that National Banks are subject to everyday, state, common law claims, where doing so does not interfere with the exercise of the bank's powers.[11] *See Barnett Bank v. Nelson*, 116 S. Ct. 1103,

(Cont'd)

accomplish here is much broader than simply the complete preemption of usury claims is answered by the activities of these same two defendants in the case of *Hare, et al. v. H & R Block and Beneficial*, Case No. CV-02-C-C-1848-W, pending in the United States District Court for the Northern District of Alabama (copies of the Complaint and Order denying Motion to Lift Stay and Remand to State Court attached as Appendices AI and AII to Respondents Brief in Opposition to Petition for Writ of Certiorari). *Hare* is a tax refund anticipation loan case, with a factual scenario very similar to the case *sub judice*. However, the Complaint does not contain a cause of action for the charging of a usurious interest rate. Despite the absence of a claim that even has the National Bank Act as a defense, Defendants have successfully managed to remove the case, and keep it in Federal Court, on preemption grounds.

11. It is clear that Plaintiffs' fraud based claims are not within the scope of the NBA's usury provisions. That is because the right vindicated by those claims, the right to truthful statements regarding what a lender charges, is wholly separate and different from protection from high interest rates, disclosed or not. For this reason, "district courts have overwhelmingly found that claims for failure to disclose interest charges are not within the scope of § 85 of the NBA." *West Virginia v. Parrish Automobile Training Co.*, 147 F. Supp. 2d 470 (N.D. W. Va. 2001), citing *Monday v. Coast to Coast Wireless Cable*, 1997 WL 114874 (M.D. Ala. 1997) (Thompson, J.) (Holding that plaintiffs' state law claims for fraudulent failure to disclose certain charges for interest and discounts did not fall within the coverage of §§ 85 and 86 of the NBA, and remanding case to state court); *Hunter v. Beneficial National Bank USA*, 947 F. Supp. 446,

(Cont'd)

1109 (1996); *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869) (national banks subject to state law that does not "interfere with, or impair [national banks'] efficiency in performing the functions by which they are

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(Cont'd)

451-52 (M.D. Ala. 1996); *Smith v. Beneficial National Bank USA*, 971 F. Supp. 513 (M.D. Ala. 1997) (DeMent, J.) (same); *Partin v. Cableview, Inc.*, 948 F. Supp. 1046, 1048-49 (S.D. Ala. 1996) (Vollmer, J.) (same).

In *Parrish Automobile*, the Court held:

> In order to come under § 85 and § 86 of the National Bank Act, the plaintiff must allege that the national bank too, received, reserved, or charged a rate of interest greater than that allowed by the laws of the state where the bank is located. *See* 12 U.S.C. §§ 85-86. In this case, the plaintiff does not allege that the interest was too high or that there was an interest rate overcharge. Instead, the plaintiff alleges that the defendants' failure to disclose to consumers the fact that Ideal Motors was adding interest points onto the rate quoted by the bank and then receiving the difference back from the bank was done in violation of the [West Virginia Consumer Credit and Protection Act].
>
> The Complaint does not refer to this as an excess charge in violation of the WVCCPA because it was a fee that was not disclosed as required by the act. However, this is not a claim that the rate charged, even after Ideal Motors added points onto the rate given by the lender, was excessive and in violation of state law regulating interest rates. This case is essentially a failure to disclose case.

Parrish Automobile, 147 F. Supp. 2d at 473.

designed to serve [the Federal] government)". This limited preemptive power (ordinary preemptive power in this case) is in stark contrast to the broad preemptive force of ERISA wherein any state law that "relates to" an ERISA plan is preempted. *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 483 (1970). It is similarly inapposite to the preemptive power of the LMRA, which extends to sate law claims that call for any construction or interpretation of the terms of a collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904 (1985).[12]

If Petitioner's position is accepted, not only will the doctrine of complete preemption be expanded to an area that it heretofore had not been, but there would be a new species of federal removal jurisdiction based on the preemption of just one claim. In the ERISA context, *any* state law action that "relates to" ERISA benefits is replaced by a federal ERISA claim. In the LMRA context, suits for violation of contracts between an employer and a collective bargaining unit are replaced by a federal cause of action when those acts are applied, no state law claims remain. That is not the case with regard to Defendants' proposed NBA preemption

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12. The existence of the Truth-In-Lending Act ("TILA") further shows very clearly that there has never been any intent for the National Bank Act to preempt all claims dealing with the disclosure of interest, which is what this case is about. The Truth-In-Lending Act states as its purpose, "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a). TILA contains a damages provision. 15 U.S.C. § 1640. If Congress recognized the NBA as the exclusive remedy for failing to disclose interest, there would have been no need for enactment of TILA. *See, Griffin v. Breckenridge*, 91 S. Ct. 1790, 1797 (1971) (As a rule of statutory constitution, it is not to be assumed that Congress meant to duplicate statutory coverage).

of usury claims. Petitioners wish to remove an entire case, leave state law claims arising out of the same conduct in the Complaint, and have the usury claim dismissed by operation of ordinary preemption. This would leave, as stated *supra*, state law claims in federal court with no jurisdictional basis to be there.

This is not the scenario extant with regard to LMRA and ERISA claims. Causes of action to enforce the terms of a collective bargaining agreement, or for ERISA benefits are purely creatures of federal law, *Rush Prudential HMO, Inc. v. Moran*, 122 S. Ct. 2151, 2166 (2002), citing *Metropolitan Life*, *supra* (cause of action for benefits necessarily a creature of state law); *Franchise Tax Bd.*, 103 S. Ct. at 2841 (suit that could construe collective bargaining agreement "purely a creature of federal law."). State law provides no independent source of private right to vindicate. *Caterpillar*, *supra*, at 2431. There is literally no state law "vessel" to carry any action forward, and any claim to procure benefits provided for by those uniquely comprehensive federal statutory schemes arises under federal law. That is not so with regard to claims for excessive interest. There is a usury vessel provided by state law, as well as other state law remedies that even Defendants do not argue would also be preempted. It is the difference in the genesis of rights sought to be vindicated that shows what a true departure from the existing jurisdictional framework an adoption of Defendants' position would be. For the first time, a case would be subject to complete preemption because of the presence of one federal claim, but still retain state law claims to remedy the same wrong.

CONCLUSION

The *Franchise Tax Bd.*, Court explained that, "For better or for worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case 'arises under' federal law." *Franchise Tax Bd.*, 103 S. Ct. at 2847. No federal cause of action appears on the face of the Complaint in this case. As such, the National Bank Act provides nothing more than a defense to this action. It is now settled that a mere defense cannot create removal jurisdiction. *Caterpillar*, 107 S. Ct. at 2430. Defendants' attempt to expand the doctrine of complete preemption sets forth a course that, "If we follow the ascent for enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or the Constitution itself with its circumvent restrictions upon legislative power." *Gully*, 57 S. Ct. at 100. The well pleaded complaint rule is the limitation on that ascent precluding removal based even on the defense of preemption. The well pleaded complaint rule should be followed in this case, and the Eleventh Circuit Court of Appeals' decision affirmed.

Respectfully submitted,

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GRANTED

No. 02-306

IN THE

Supreme Court of the United States

FILED
OFFICE OF THE CLERK

BENEFICIAL NATIONAL BANK AND
BENEFICIAL TAX MASTERS, INC.,
Petitioners,

v.

MARIE ANDERSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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CORPORATE DISCLOSURE STATEMENT

In addition to the Rule 29.6 statement in their opening brief on the merits, petitioners state as follows:

On March 28, 2003, Household International, Inc., was merged into H2 Acquisition Corporation, a wholly-owned subsidiary of HSBC Holdings plc, which was then renamed as Household International, Inc. As a result of the foregoing transactions, Household International, Inc., is now a wholly-owned subsidiary of HSBC Holdings plc, which is publicly traded. Household International, Inc., is in turn the parent corporation of Household Finance Corporation and Household Tax Masters, Inc., each of which has retained its separate corporate existence.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

A. Respondents Cannot Avoid Removal By Mischaracterizing A Federal Claim As A State Claim 2

B. Federal Law Exclusively Governs The Interest That May Be Charged By National Banks 4

C. Respondents' Usury Claim Arises Exclusively Under Federal Law 7

D. Congress Has Made Sufficiently Clear That Usury Claims Against National Banks Are Exclusively Federal In Nature, And May Therefore Be Removed 12

E. Removal Jurisdiction Does Not Turn On Congress's Intent To "Convert" A Particular State Claim Into A Federal Claim 15

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Page(s)

Avco Corp. v. *Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557 (1968).....9, 13, 18
Barnett Bank v. *Nelson*, 517 U.S. 25 (1996).....11
Caterpillar Inc. v. *Williams*, 482 U.S. 386 (1987).....18
Charles Dowd Box Co. v. *Courtney*, 368 U.S. 502 (1962).....14
El Paso Natural Gas Co. v. *Neztsosie*, 526 U.S. 473 (1999).....16
Evans v. *National Bank of Savannah*, 251 U.S. 108 (1919).....8
Farmers' & Mechanics' Bank v. *Dearing*, 91 U.S. 29 (1875).....11
Firestone Tire & Rubber Co. v. *Bruch*, 489 U.S. 101 (1989).....19
Franchise Tax Board v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).....3, 9, 16, 18, 19
Gully v. *First National Bank in Meridian*, 299 U.S. 109 (1936).....8, 9
Marquette National Bank v. *First Omaha Service Corp.*, 439 U.S. 299 (1978).....5, 6
Metropolitan Life Insurance Co. v. *Taylor*, 481 U.S. 58 (1987).....9, 12, 14, 18
Rivet v. *Regions Bank of Louisiana*, 522 U.S. 470 (1998).....3, 18
Schneidewind v. *ANR Pipeline Co.*, 485 U.S. 293 (1988).....10
Skelly Oil Co. v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950).....2-3
Tiffany v. *National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1874).....6, 7
United States v. *Locke*, 529 U.S. 89 (2000).....11

TABLE OF AUTHORITIES—Continued

STATUTES

Page(s)

National Bank Act of 1864,
12 U.S.C. § 30.....*Passim*
12 U.S.C. § 85.....1, 5, 19
12 U.S.C. § 86.....1, 6
28 U.S.C. § 1331.....2, 14, 15, 16
28 U.S.C. § 1367.....4
28 U.S.C. § 1441.....1, 14, 16
28 U.S.C. § 1445.....15
29 U.S.C. § 185(a).....9, 13
29 U.S.C. § 1132(e)(1).....14
29 U.S.C. § 1132(f).....9
42 U.S.C. § 2014(hh).....17

TREATISES

5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 1206, 1209 (2d ed. 1990).....16

IN THE

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BENEFICIAL NATIONAL BANK AND
BENEFICIAL TAX MASTERS, INC.,
Petitioners,

v.

MARIE ANDERSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

Respondents allege that a national bank charged them excessive interest. In a long line of decisions, this Court has consistently read Section 30 of the National Bank Act of 1864, 12 U.S.C. §§ 85-86, as providing that (a) this federal law, and only this federal law, regulates the permissible rate of interest that a national bank may charge, and (b) the only remedy against a national bank for charging excessive interest is also set forth in this federal law. *See* Pet. Br. 11-14. It follows, therefore, that no state-law usury claim is available against a national bank, and that respondents' usury claim necessarily arises under federal law. Because respondents' usury claim in their complaint arises under federal law, that claim may be removed to federal court under 28 U.S.C.

§ 1441, along with any other supplemental state-law claims that they may have raised in their complaint.

The resolution of this case is therefore quite straightforward. Nonetheless, respondents make a variety of arguments in an effort to persuade this Court that they have a state-law usury claim that should remain before the state courts. First, they argue (Resp. Br. 5-9) that, under the well-pleaded complaint rule, federal "arising under" jurisdiction under 28 U.S.C. § 1331 turns entirely on whether the plaintiff states a federal claim "on the face of the complaint," and so, because they have not *expressly* invoked federal law in their complaint, this case cannot be said to arise under federal law. Second, they argue (Resp. Br. 17-22) that state law in fact governs the interest rate that a national bank may charge. Third, they contend (Resp. Br. 9-17) that Section 30 of the National Bank Act at most provides a federal defense of preemption to a national bank that is faced with a state-law usury claim, and does not provide that federal law is the only source of a possible usury claim against a national bank. Finally, they argue that Congress has not indicated with sufficient clarity that usury claims are to be treated as federal in nature or are to be subject to removal (Resp. Br. 22-32). All of these arguments are without merit.

A. Respondents Cannot Avoid Removal By Mischaracterizing A Federal Claim As A State Claim

Respondents' principal contention is that they refrained from pleading a federal cause of action in their complaint, and so there is no well-pleaded controversy arising under federal law in this case. The well-pleaded complaint rule that respondents invoke, however, has never been understood to allow a party to avoid federal jurisdiction by mischaracterizing (or failing accurately to characterize) the source of law underlying a cause of action. It is true that a plaintiff cannot establish original federal jurisdiction by pleading an anticipated federal defense to its state-law claim. *See Skelly Oil*

Co. v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950). It is similarly true that a defendant cannot establish federal removal jurisdiction by pleading a federal defense to a real and substantial state-law claim raised in the complaint. *See Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 10-11 (1983). But this Court has never suggested that a plaintiff can avoid federal removal jurisdiction simply by mischaracterizing a claim as arising under state law, when that claim actually arises under federal law.

Indeed, mischaracterizing a federal claim as a state claim is exactly the kind of "artful pleading" that this Court has long condemned, and has held must be disregarded for purposes of ascertaining whether a federal court has jurisdiction over a case. Thus, it is a corollary to the well-pleaded complaint rule that the court itself should determine the true character of the claim. *See* Pet. Br. 16-19. As this Court recently reiterated in *Rivet* v. *Regions Bank of Louisiana*, 522 U.S. 470 (1998), "a plaintiff may not defeat removal by omitting to plead necessary federal questions," and "[i]f a court concludes that a plaintiff has 'artfully pleaded' claims in this fashion, [the court] may uphold removal even though no federal question appears on the face of the complaint." *Id.* at 475-476 (internal quotation marks omitted). Similarly, in *Franchise Tax Board*, the Court made clear that, although it is often said that "the party who brings the suit is master to decide what law he will rely upon," that aphorism is qualified by the "independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." 463 U.S. at 22 (internal quotation marks omitted).

In this case, respondents have attempted to avoid removal by refusing to plead a "necessary federal question" in their usury claim against petitioners—namely, whether the interest charged by petitioners exceeded the permissible rates allowed by federal law. But notwithstanding that refusal, it is clear from the complaint that respondents' usury claim necessarily arises under federal law. Respondents have sued

a national bank, and have alleged in a count of their complaint that the national bank charged them excessive interest. See J.A. 28-29. Nothing more is needed to establish that respondents' usury claim arises under federal law.[1]

B. Federal Law Exclusively Governs The Interest That May Be Charged By National Banks

Respondents argue (Resp. Br. 17) that the National Bank Act "vests the *states* with the authority to legislate and establish interest rate limitations" on national banks. This assertion reflects a serious misapprehension about Section 30 of the National Bank Act. Section 30 does not give the states

[1] In an apparent effort to deflect attention from the fact that their usury claim necessarily arises under federal law, respondents note that they have also alleged that petitioners engaged in "misrepresentations and suppressions" of the actual interest rate charged for the loans at issue (*see* Resp. Br. 7-8). But whether respondents' complaint *also* asserts a state-law claim for fraud is irrelevant to the question before the Court. We have not contended that respondents' claims based on alleged "misrepresentations" or "suppressions" of the actual interest rate arise under federal law. Respondents could have chosen to stand on a state-law fraud claim alone, undertaking to shoulder the difficulties of pleading and proof inherent in any fraud case. Instead, they elected also to plead a claim for usury. Having done so, however, they cannot avoid the implications of that choice, which is that they have asserted a claim that arises under federal law and is removable to federal court.

Respondents argue (Resp. Br. 28) that, if the federal district court were to dismiss their state-law usury claim on "complete preemption" grounds, only state-law claims would remain in their complaint, which the district court would then have discretion to remand to state court. In reality, the district court would presumably treat the usury claim as a federal claim and resolve it on its merits. If the district court dismissed the federal usury claim on the merits, then the district court would have discretion under 28 U.S.C. § 1367 to retain supplemental jurisdiction over the state-law claims in the complaint, as those claims also arise out of the set of facts involved in the federal claim. But even if, after it dismissed the federal usury claim on the merits, the district court remanded the case, respondents' state-court lawsuit would then be shorn of any usury claim, and they would be left to pursue only fraud-type claims against petitioners.

any power to set interest rates that may be charged by national banks. Rather, Section 30 provides authority to national banks, as a matter of federal law, to charge certain interest rates. In some circumstances, the federal standard setting the interest rate that a national bank may charge may be informed by reference to state law, because the federal statute provides that, at a minimum, a national bank is federally authorized to charge whatever rates states allow for competitive lenders that a state may regulate. Nevertheless, the National Bank Act establishes that "[t]he interest rate that [a national bank] may charge" is "governed by federal law." *Marquette Nat'l Bank* v. *First Omaha Serv. Corp.*, 439 U.S. 299, 308 (1978).

Section 85 of Title 12, which is derived from Section 30 of the National Bank Act of 1864, provides:

> Any association may . . . charge . . . interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State . . . .

Under this provision, a national bank is federally authorized to charge interest up to any of the highest of three possible rates. First, a national bank may charge interest at the highest rate allowed by the laws of the state in which the bank is "located." Second, a national bank "organized or existing" in a state may charge interest at the rate that state allows for state-chartered banks. Third, a national bank may charge interest at one percent above the 90-day federal discount rate. *See Marquette*, 439 U.S. at 301 n.1, 308;

Tiffany v. *National Bank of Mo.*, 85 U.S. (18 Wall.) 409, 411 (1873).

Section 30 of the National Bank Act thus grants an explicitly federal authorization to charge interest, creates a distinct federal regime to decide what interest is allowable, and establishes an exclusively federal remedy (set forth in 12 U.S.C. § 86) if an unlawful amount is charged. To be sure, the standards for allowable interest refer in part to state laws—as noted, by allowing, as a federal *minimum* for national banks, certain rates that state laws allow for lenders that the states have the power to regulate. But that is far from establishing that the National Bank Act "vest[s] the states" with the authority to regulate interest charged by national banks, as respondents contend.

To the contrary, Section 30 of the National Bank Act merely refers to state laws that are applicable to state-regulated lenders as a "floor" among the alternatives that are authorized for national banks, to provide as a distinctly federal prescription that national banks may charge at least as much as the states allow their most favored lenders. Moreover, the Act broadens the interest-charging authority of national banks in a distinctly federal way, beyond what state law could do for any lender: it authorizes a national bank based in one state to charge the highest rates allowed by that state for its most favored lender, even when the national bank is lending to borrowers in another state. *See Marquette*, 439 U.S. at 318. Thus, whether or not, as respondents contend (Resp. Br. 19-20), Alabama usury law would apply to a loan made to an Alabama consumer by an Alabama-chartered state bank, it is definitely *not* the case that Alabama usury law would apply to a loan made to Alabama residents (such as respondents) by an out-of-state national bank (such as petitioner).

Given the background against which the National Bank Act of 1864 was enacted, it is hardly surprising that Congress rejected the course of delegating to the states the authority to

regulate interest charged by national banks. The National Bank Act was born of federal wariness of state regulation of national banks, not federal deference to such regulation. *See* U.S. Br. 24-25. As this Court explained in *Tiffany*, because the states had a vested interest in protecting their own state-chartered banks from the competition presented by the new national banks, Congress reasonably feared the prospect of "unfriendly state legislation" regarding national banks, and therefore determined to provide those national banks with "advantages," particularly advantages in charging interest. 85 U.S. (18 Wall.) at 412-413. That is why Congress allowed national banks to benefit from the most favorable of a variety of interest-rate options, including the most favorable interest rate permitted by the state in which the bank is "located," even if a state-chartered bank could not obtain the same benefit. By force of federal law, Congress designated national banks as "[n]ational favorites." *Id.* at 413.

C. Respondents' Usury Claim Arises Exclusively Under Federal Law

1. Respondents contend that Section 30 of the National Bank Act does not establish that usury claims against national banks can arise only under federal law, but instead merely provides petitioners with a federal *defense* against a state usury claim.[2] Resp. Br. 12-15. That argument is simply

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[2] Respondents appear at several points to acknowledge that their state-law usury claim against petitioners is subject to dismissal on the ground of preemption under Section 30 of the National Bank Act (*see* Resp. Br. 11-12 n.2; *see also id.* at 13 n.3, 28 n.8.), and they studiously avoid explaining how that usury claim could possibly survive such preemption. We assume that respondents did not allege a usury claim in their complaint on the expectation that this claim would be promptly dismissed. Nonetheless, we can conceive of no way in which respondents could plausibly argue that Alabama law could survive preemption and be applied to this case. If respondents have some basis for making such an argument, it has never yet surfaced in this litigation. Nor have respondents explained why they prefer to plead a nonexistent state-law claim in preference to a claim under the National Bank Act. *See also* American

contrary to a long line of this Court's cases making clear that the exclusive *basis* for any usury claim against a national bank is federal law. *See* Pet. Br. 13-14 n.12 (collecting cases); *see also* U.S. Br. 22-26. Indeed, the Court's decisions on this point could scarcely be more definitive. The Court has consistently held that "federal law . . . completely defines what constitutes the taking of usury by a national bank." *Evans* v. *National Bank of Savannah*, 251 U.S. 108, 114 (1919).

Contrary to respondents' argument, *Gully* v. *First National Bank in Meridian*, 299 U.S. 109 (1936), does not hold that Section 30 of the National Bank Act is properly understood as establishing only a preemption defense to a state-law usury claim. *Gully* did not involve Section 30 or a usury claim at all. In *Gully*, a state tax collector brought suit against a national bank in state court to recover state taxes that were due from the bank's predecessor. The state authorities alleged that the bank had assumed by contract the predecessor bank's obligation to pay those state taxes. The national bank removed the case to federal court, contending that the case arose under federal law because the National Bank Act authorized the states to tax the shares of national banks. This Court held that removal was improper because, even if federal law had authorized the states to exercise their taxing power in that manner, the actual tax at issue—as well as the supposed contractual obligation of the predecessor to pay that tax—was an exercise of state law. As the Court explained, "[t]hat there is a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state." 299 U.S. at 115.

Here, the "basis of the suit" against petitioner is necessarily federal rather than state law. Unlike *Gully*, this is not a case in which the federal government authorized the states to

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Bankers Ass'n Amicus Br. 23-29 (noting pattern of nonexistent state-law usury claims brought in state courts against national banks, and explaining adverse effects on national banks caused by such litigation).

regulate national banks, and a state then exercised that authority by applying its own law to a national bank. As we have explained (see pp. 4-7, *supra*), the National Bank Act does not vest states with authority to regulate the interest rates charged by national banks. Rather, in the National Bank Act, Congress permitted national banks, as a matter of federal law, to charge interest at the most advantageous of three rates, including the most favorable rate available to state-regulated lenders. Thus, in any case in which a plaintiff sues a national bank claiming usury, the plaintiff necessarily "counts upon the statute" (the National Bank Act) in making such a claim. *Gully*, 299 U.S. at 112.

2. When Congress enacted Section 30 of the National Bank Act, it entirely supplanted the application of any state usury laws against national banks—just as, when Congress enacted Section 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185, it supplanted state-law contract law insofar as it would otherwise have been applicable to collective bargaining agreements, *see Avco Corp.* v. *Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557 (1968), and just as, when it enacted Section 502(f) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(f), it displaced any state-law contract or trust law insofar as it would otherwise have been applicable to employee benefit plans, *see Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987). Any usury suit against a national bank is "purely a creature of federal law" (*Franchise Tax Board*, 463 U.S. at 23), even if state law might have provided a cause of action for usury in the absence of the National Bank Act.

Respondents err in arguing (Resp. Br. 30-32, 36) that this case is distinguishable from the LMRA and ERISA situations on the ground that state law provides no "independent source of private rights" to plaintiffs suing under the LMRA or ERISA. The displacement of state law by federal law is at least as clear under Section 30 of the National Bank Act as it is under the LMRA and ERISA (especially in light

of this Court's long line of decisions holding that usury claims against national banks are exclusively federal in nature). In each case, any claim within the scope of the federal cause of action arises only under federal law and is resolved by the application of federal law.

There is no independent state-law source of rights to plaintiffs proceeding under the LMRA and ERISA because Congress has supplanted such state law—and that is just as firmly the case with usury claims against national banks as well. The LMRA and ERISA ousted state-law causes of action under the common law of contracts and trusts, insofar as they might have been otherwise applicable (and indeed *had been* applicable, before those federal statutes were enacted) to suits to enforce collective bargaining agreements and to obtain benefits due under the terms of an employee benefit plan. So too here, Congress has ousted the state law of usury from application to national banks.

3. In a related argument, respondents attempt to distinguish the LMRA and ERISA situations by stressing that the LMRA and ERISA effectuated comprehensive federal field-preemption of the pertinent subject matters. They contend that the National Bank Act does not preclude the application of state laws to national banks in a similarly broad fashion. *See* Resp. Br. 32-35; *see also* States Amici Br. 15-20; Consumer Attorneys Amicus Br. 11-17.

This argument is wide of the mark, for the *breadth* of the federal preemption of a subject matter is not the key to determining whether federal law provides the exclusive basis for asserting a particular claim. "Field preemption" is a phrase sometimes used in preemption analysis to describe a conclusion that Congress has precluded any state regulation of a subject matter; within the "field," state laws cannot operate at all, whether or not they actually conflict with federal law. *See Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 310 (1988). That "field preemption" analysis is not the same as the question whether Congress has intended that any cause

of action that might arise on particular kinds of facts be exclusively federal in nature. One analysis has to do with the permissibility of any state regulation at all in a particular subject matter; the other has to do with the permissibility of state causes of action cognizable in court.

If, nevertheless, a field-preemption approach is employed, then it is clear that Congress has occupied the field relevant here—namely, the field of interest that may be charged by national banks. Congress did so in Section 30 of the National Bank Act by setting a federal standard for permissible interest charges by national banks, establishing a substantial remedy for borrowers when the national bank has violated that standard, and precluding the operation of state laws of their own force in this area. It is simply beside the point that there may be other activities of national banks on which, to some limited extent, state law may have an impact, for Congress has provided that *usury* by national banks is exclusively a matter of federal law. As Congress has completely ousted state law from that field, respondents can proceed on a usury claim only under federal law.[3]

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[3] In any event, respondents (and the amici states) substantially exaggerate the extent to which state laws are applicable to national banks. As both observe, this Court has concluded that, in some circumstances, the application of some state law to national banks is consistent with the National Bank Act. *See Barnett Bank* v. *Nelson*, 517 U.S. 25, 33-34 (1996). Nonetheless, the Court has also made clear that the activities of national banks enjoy substantial protection from state law. *See ibid.*; *Farmers' & Mechanics' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 33 (1875). The traditional presumption against preemption of state law does not apply to the regulation of national banks, for the national banking system has been an "area where there has been a history of significant federal presence" (*United States* v. *Locke*, 529 U.S. 89, 108 (2000)) since that banking system was first established. *See Barnett Bank*, 517 U.S. at 32, 34 (observing that federal statutory grants of enumerated and implied powers to national banks are traditionally interpreted "as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law," and that "where Congress has not expressly conditioned the

D. Congress Has Made Sufficiently Clear That Usury Claims Against National Banks Are Exclusively Federal In Nature, And May Therefore Be Removed

1. Attempting to draw support from this Court's decision in *Metropolitan Life*, respondents argue (Resp. Br. 22) that "express statutory language" is necessary for a conclusion that Congress intended to "displace entirely any state cause of action." It is worth noting at this point that respondents make little effort to defend the central basis of the court of appeals' ruling, which required evidence of a specific congressional intent *to allow removal* of a particular claim before that claim could be said to be "completely preempted" (and therefore removable). *See* Pet. App. 13a-16a. As we have explained in our opening brief (Pet. Br. 30-32), any search for a specific congressional intent *to allow removal* of a particular claim is entirely misguided, because Congress has made removal available across-the-board to defendants faced with federal causes of action in state courts. The pertinent question, rather, is whether Congress has provided that a particular cause of action must be federal in nature (regardless of the label placed on it by the plaintiff). *See also* U.S. Br. 26-27; States Amici Br. 2 (both agreeing that evidence of specific congressional intent to allow removal of a claim is not required).

Rather, respondents appear to make a different claim, namely, that what is required is a statutory command that a federal cause of action would exclusively apply in a particular situation. But if that is respondents' formulation, then the National Bank Act surely fits the bill, for indeed there is statutory language supplanting the application of state usury laws to loans made by national banks—namely, Section 30 itself. While Section 30 may not recite *in haec verba* that

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grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies").

"no state usury law shall apply to a national bank," this Court has consistently read Section 30 to have precisely that effect, and it has also consistently held that the only remedy for the charging of excessive interest by a national bank is that provided under Section 30 itself. *See* Pet. Br. 13-14 n.12 (collecting cases).

Further, any rule that Congress must use specified words to verbalize that "no state law shall apply" in order to make a federal cause of action exclusive could not be reconciled with *Avco*, the leading case in which this Court ruled that Congress had completely replaced state claims with a federal cause of action. There is no such language in LMRA § 301(a), the law under consideration in *Avco*. All that Section 301(a) provides is that

> [s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). Despite the absence of any language in that provision referring in any way to state law, this Court has held not only that federal substantive law is to be applied in suits brought under this section, but that federal substantive law is to be *exclusively* applied.

2. Respondents further argue that the background of the National Bank Act does not demonstrate that Congress was concerned about the hostility of state *courts* to national banks, and so there is no basis to conclude that Congress specifically intended to treat all usury claims against national banks as arising under federal law. Respondents point out (Resp. Br. 15, 25-26) that, when the National Bank Act was enacted in 1864, Congress expressly allowed suits under the Act to go forward in both state and federal courts, and that

Congress has never provided for exclusive federal jurisdiction over usury suits against national banks. Respondents attempt to contrast that situation with ERISA and the LMRA, in which (they maintain) Congress did not demonstrate an affirmative acceptance of state-court jurisdiction.

This submission fails for several reasons. First, respondents' argument based on affirmative congressional acceptance of state-court jurisdiction does not distinguish usury suits against national banks from actions for benefits due under an ERISA plan, which this Court has concluded are exclusively federal in nature. *See Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987). Although ERISA establishes exclusive federal jurisdiction for some kinds of actions, it expressly preserves concurrent state-court jurisdiction over actions for benefits due under the terms of a plan. *See* 29 U.S.C. § 1132(e)(1). Second, given the strong presumption in favor of concurrent state- and federal-court jurisdiction over federal causes of action, *see Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962), it proves little to show that, in the National Bank Act, Congress expressly endorsed the prevailing arrangement under which state courts may adjudicate federal causes of action.

More fundamentally, respondents' argument rests on the fallacious assumption that removal turns on a showing of congressional concern about state-court hostility to a particular federal right. It does not. Removal is an option that Congress has made available generally to defendants faced with federal claims. The removal statute, 28 U.S.C. § 1441, requires no showing of state-court hostility or local prejudice; it requires only that that the claim would lie within the district court's original jurisdiction, including of course the court's § 1331 jurisdiction over cases arising under federal law. There are a myriad of causes of action that Congress has fashioned under federal law; the vast majority of them may be brought as an original matter in either state or federal court; and yet Congress has provided that virtually all of them may be removed to federal court at the option of the

defendant (with only a few well-known exceptions, *see* 28 U.S.C. § 1445). Specifics of state-court hostility play no role in this analysis.

E. Removal Jurisdiction Does Not Turn On Congress's Intent To "Convert" A Particular State Claim Into A Federal Claim

1. The amici states argue that "complete preemption" of a state cause of action is properly found only when Congress specifically manifests an intent to "convert" a preexisting state-law cause of action into a federal cause of action, and not when Congress creates an exclusive federal cause of action. *See* States Amici Br. 11-15. It is far from clear what the amici states mean by "converting" a claim from state to federal. Nor is it evident why the touchstone of removability should be Congress's intent to effectuate such a "conversion," rather than—as the United States argues more straightforwardly—Congress's intent to fashion an exclusively federal cause of action and thereby to supplant any state-law causes of action that might otherwise have been available (*see* U.S. Br. 10).

If by "conversion," the states mean that a cause of action cannot be removed to district court unless Congress specifically intended that the state law purportedly underlying that claim should be "recharacterized" as federal law, then the states' argument suffers from the same defect as that of the court of appeals' decision.[4] The district courts' original ju-

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[4] Although the amici states claim to abjure the court of appeals' requirement of a specific congressional intent to allow removal of a particular claim (*see* States Amici Br. 2, 8), they nonetheless place considerable reliance on the fact that the general removal statute did not exist when Congress enacted the National Bank Act, and that Congress has not specifically manifested an intent that usury claims against national banks be removable since it enacted the removal statute in 1875 (*see id.* at 18-19). But as we have explained, the proper issue is not whether Congress specifically intended that usury claims against national banks be removable.

risdiction (under § 1331) and removal jurisdiction (under § 1441) turn, equally and across-the-board, on whether a cause of action in the complaint actually arises under federal law. Any case arising under federal law (subject to certain express exceptions) may be removed, just as any case arising under federal law may be brought within a district court's original jurisdiction. It is equally irrelevant in both the removal and the original-jurisdiction contexts *how* Congress arrived at the conclusion that a particular cause of action should be considered federal in nature.[5]

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but whether it intended that they be exclusively federal in nature. If such claims are federal, then they are necessarily removable.

Like the court of appeals, the states seem to suggest that a federal statute enacted before 1875 could never support "complete preemption," even though a claim stated under such an early federal statute would obviously arise under federal law. But that approach would lead to the indefensible result that a claim falling within the district court's original "arising under" jurisdiction under § 1331 if brought there as an initial matter could not be removable under § 1441 if it were initially brought in state court. *See Franchise Tax Board*, 463 U.S. at 8 ("[T]he propriety of removal turns on whether the case falls within the original 'federal question' jurisdiction of the United States district courts[.]").

For example, if respondents had initially brought their usury claim in federal district court but had expressly relied only on Alabama state law for their asserted right to recover, the district court plainly would have had authority to examine the true nature of the case and to determine that the claim was in fact federal. *See generally* 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*, §§ 1206, 1209 (2d ed. 1990). In such a case, the jurisdiction of the federal court would not turn on whether Congress had "converted" the purportedly state claim into a federal claim, but simply on whether the claim was federal in nature. There is no basis for the states' suggestion that the district court cannot or should not take exactly the same approach when a purportedly state claim is removed to federal court on the ground that it is, in fact, a federal claim.

[5] The amici states point to the Price-Anderson Act as an example of a situation where Congress has expressly "converted" state-law causes of action into federal claims. *See* States Amici Br. 9; *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 484 (1999). The Price-Anderson Act, however, differs from other "complete preemption" situations (such as ERISA and the LMRA) in a fundamental way. In the ERISA and LMRA situations, federal law provides the applicable substantive law, although the courts may draw the content of that federal law from general state-law principles, to the extent that it is appropriate to do so. *See* pp. 17-18, *infra*. In the Price-Anderson Act, Congress created the unusual situation in which federal law establishes the cause of action, but the governing substantive law is provided by the law of the state where the underlying incident occurred. *See* 42 U.S.C. § 2014(hh). In that situation, it may be technically accurate to describe Congress as having "converted" state law into federal law. Moreover, given that federal law is presumptively uniform across the nation, it was likely necessary for Congress to state explicitly in the Price-Anderson Act that principles of a *particular* state law (the law of state where the underlying event occurred), rather than general principles drawn from state law, should be applied in any Price-Anderson Act suit. The Court has never suggested, however, that "complete preemption" will be found only in such an unusual situation, and neither *Avco* nor *Metropolitan Life* involved such a case.

There is no logical reason why the removability of an exclusive federal cause of action should turn on whether it was "converted" from a state cause of action, as the states appear to suggest, rather than on whether Congress displaced all state causes of action that might have otherwise been applicable (as we maintain, and as the United States agrees). Certainly nothing in the removal statute suggests why the plaintiff should be able to defeat removal in one situation but not the other. In each case, the plaintiff has asserted a claim for relief that could have a basis only under federal law, even though the plaintiff has purported to rely on a nonexistent state-law theory.

Nor is there any federalism interest to be served by requiring a showing that Congress "converted" a claim from state to federal. In the context of the National Bank Act, as in the LMRA and ERISA situations, it is Congress's creation of an exclusive federal cause of action and its displacement of all state causes of action that constitute the intrusion on state sovereignty. Once that (permissible) intrusion has occurred, however, there is no legitimate federalism interest to

be served by permitting plaintiffs to avoid the jurisdiction of the federal courts merely by claiming to pursue state causes of action that are in fact nonexistent.

2. Although this Court has occasionally referred in passing to "complete preemption" as "convert[ing] an ordinary state common law complaint into one stating a federal claim" (*Metropolitan Life*, 481 U.S. at 65), or "transform[ing] the plaintiff's state-law claims into federal claims" (*Rivet*, 522 U.S. at 476), the Court was not using the terms "convert" and "transform" in a technical sense. Indeed, the Court has used those terms interchangeably with "displaced" and "replaced." *See Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 394 (1987); *Metropolitan Life*, 481 U.S. at 60, 64, 66; *Franchise Tax Board*, 463 U.S. at 23-24, 26.

Rather, in using those terms, the Court was explaining that, although a court adjudicating an exclusively federal claim might well look to state law for guiding principles, such state law would not apply of its own force, but would be incorporated, where appropriate, into federal law. *See Avco*, 390 U.S. at 559-560 (explaining that Congress did not intend to prohibit courts adjudicating LMRA § 301 cases from looking to state contract law rules, where appropriate, but that such state law would be "absorbed as federal law" rather than apply of its own force). Thus any claim seeking to enforce a collective bargaining agreement or seeking benefits due under a benefit plan must be considered in a sense as having been "converted" into a federal claim in order to go forward, for otherwise no claim could be stated at all; the state law that the plaintiff might otherwise have invoked has been entirely supplanted.

The Court has *not* suggested, however, that courts hearing such "completely preempted" claims should simply transmute any state-law principles that might otherwise have been applicable into federal law. The federal principles governing such cases are not vessels for the passive reception of "converted" state-law rules, as the states seem to suggest.

Rather, they are federal principles drawn, as the courts find it appropriate, from useful and commendable state-law rules, and possibly from other sources as well (such as the policies of the statutes and rules under analogous federal laws). *See Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989) (stressing that the "courts are to develop a federal common law of rights and obligations under ERISA-regulated plans") (internal quotation marks omitted); *Franchise Tax Board*, 463 U.S. at 24 n.26 (noting that Congress intended that "a body of Federal substantive law [would] be developed by the courts" under ERISA).

So too, any state-law usury claim brought against a national bank must be thought of as having been "converted" into a federal claim if it is to go forward at all. Even if a plaintiff pursuing a usury claim against a national bank might claim to stand on a state usury law, that state law of its own force cannot afford the plaintiff relief. This Court's decisions have made that clear beyond doubt. A state law governing interest rates can provide the rule of decision in a usury suit against a national bank, but only when that state-law standard properly applies to the national bank under the circumstances set forth in 12 U.S.C. § 85 (*see* pp. 5-6, *supra*). While Section 30 of the National Bank Act thus might be said to "borrow" the interest rate limits of the home states of national banks in certain circumstances (*see* States Amici Br. 15), it is nonetheless the National Bank Act, and not those incorporated state laws themselves, that governs the permissible rate of interest that may be charged by a national bank.

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In sum, Section 30 of the National Bank Act makes clear that any usury claim brought against a national bank necessarily arises under federal law, and only under federal law. Respondents have brought a usury claim against a national bank. Their claim therefore arises under federal law, and was properly removed to federal district court.

CONCLUSION

For the reasons stated above as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed, and the case remanded for further proceedings in the district court.

Respectfully submitted,

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No. 02-306

In the Supreme Court of the United States

BENEFICIAL NATIONAL BANK, ET AL., PETITIONERS

v.

MARIE ANDERSON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a claim alleging usury by a national bank necessarily arises under the exclusive federal cause of action created by Section 30 of the National Bank Act, ch. 106, 13 Stat. 108 (12 U.S.C. 86), and is therefore removable to federal court.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	4
Argument:	
A claim alleging usury by a national bank necessarily arises under the exclusive cause of action created by the National Bank Act and is thus removable to federal court	8
A. The text of the removal statute makes clear that any claim "arising under" federal law is removable, and a claim within the scope of an exclusive federal cause of action necessarily arises under federal law	8
B. This Court's cases confirm that a claim within the scope of an exclusive federal cause of action is removable even if the claim does not purport to rely on federal law	11
C. The rule that a claim within the scope of an exclusive federal cause of action is removable advances the purposes of the removal statute	16
D. The National Bank Act creates the exclusive cause of action for usury by a national bank, and respondents' usury claim falls within the scope of that cause of action	20
E. The court of appeals erred by requiring specific evidence that Congress, when it enacted the National Bank Act, intended to allow removal of usury claims	26
Conclusion	30
Appendix	1a

TABLE OF AUTHORITIES

Cases: Page

American Airlines v. *Wolens*, 513 U.S. 219 (1995) 19
American Well Works Co. v. *Layne & Bowler Co.*, 241 U.S. 257 (1916) 9
Avco Corp. v. *Aero Lodge No. 735*, 390 U.S. 557 (1968) 5, 11, 28
Barnet v. *National Bank*, 98 U.S. 555 (1879) 22
Boys Mkts., Inc. v. *Clerks Union*, 398 U.S. 235 (1970) 16
Caterpillar Inc. v. *Lewis*, 516 U.S. 61 (1996) 18
Caterpillar Inc. v. *Williams*, 482 U.S. 386 (1987) 3, 9-10, 11, 12, 15, 17
Chicago, Rock Island & Pac. R.R. v. *Stude*, 346 U.S. 574 (1929) 18
Cohen v. *Welden Nat'l Bank*, 146 A. 252 (Vt. 1929) 23
Community Bank & Trust, N.A. v. *Keyser*, 285 S.E.2d 424 (W. Va. 1981) 23
Easton v. *Iowa*, 188 U.S. 220 (1903) 7, 24
England v. *Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964) 17
Evans v. *National Bank*, 251 U.S. 108 (1919) 22
Farmers' & Mechs.' Nat'l Bank v. *Dearing*, 91 U.S. 29 (1875) 2, 7, 21, 22
First Nat'l Bank v. *Nowlin*, 509 F.2d 872 (8th Cir. 1975) 23
Franchise Tax Bd. v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) ..... *passim*
Gold-Washing & Water Co. v. *Keys*, 96 U.S. 199 (1877) 18
Gully v. *First Nat'l Bank*, 299 U.S. 109 (1936) 10
Hasteline v. *Central Nat'l Bank*, 183 U.S. 132 1901) 22
Hawaiian Airlines, Inc. v. *Finazzo*, 512 U.S. 246 (1994) 19

Cases—Continued: Page

Hillsborough County v. *Automated Med. Labs., Inc.*, 471 U.S. 707 (1985) 10
Louisville & Nashville R.R. v. *Mottley*, 211 U.S. 149 (1908) 9
Marquette Nat'l Bank v. *First of Omaha Serv. Corp.*, 439 U.S. 299 (1978) 7, 25
Martin v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) 16
McCollum v. *Hamilton Nat'l Bank*, 303 U.S. 245 (1938) 23
M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 25
Metropolitan Life Ins. Co. v. *Taylor*, 481 U.S. 58 (1987) 5, 6, 13, 14, 28, 29
M. Nahas & Co. v. *First Nat'l Bank*, 930 F.2d 608 (8th Cir. 1991) 20
Osborn v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) 8
Pilot Life Ins. Co. v. *Dedeaux*, 481 U.S. 41 (1987) 13, 14
Pullman Co. v. *Jenkins*, 305 U.S. 534 (1939) 18
Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) 19
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Tiffany v. *National Bank*, 85 U.S. (18 Wall.) 409 (1873) 7, 25
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Vorhees v. *Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2002) 20

Statutes: Page

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Airline Deregulation Act of 1978, 49 U.S.C. 41713 19
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* 6, 13, 28
§ 502(a), 29 U.S.C. 1132(a) 13, 14, 28, 29
§ 514(a), 29 U.S.C. 1144(a) 13, 14
Labor Management Relations Act, 1947, § 301, 29 U.S.C. 185 ..... 5, 11-12, 14, 15, 28
National Bank Act, ch. 106, § 30, 13 Stat. 108 ..... 1, 2, 21, 24
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29 U.S.C. 157 19
29 U.S.C. 158 19
Ports and Waterways Safety Act, 46 U.S.C. 3703 19
Railway Labor Act, 45 U.S.C. 151 *et seq.*:
45 U.S.C. 151a 19
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28 U.S.C. 1331 ..... 2, 4, 8, 27, 29, 2a
28 U.S.C. 1367(a) 11, 3a
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In the Supreme Court of the United States

No. 02-306

BENEFICIAL NATIONAL BANK, ET AL., PETITIONERS

v.

MARIE ANDERSON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The Office of the Comptroller of the Currency (OCC) is the bureau within the Department of Treasury that is responsible for the administration of the National Bank Act, 12 U.S.C. 21 *et seq.*, and the supervision of national banks. As the agency charged with interpretation of the National Bank Act and with protecting the safety and soundness of the national banking system, the OCC has an interest in whether national banks may remove actions alleging claims within the scope of the Act's exclusive cause of action for usury, 12 U.S.C. 86.

STATEMENT

1. a. Section 30 of the National Bank Act, ch. 106, 13 Stat. 108, prescribes the interest rate that a national bank may

charge its loan customers and establishes a cause of action for usury. The provisions of Section 30 are codified at 12 U.S.C. 85 and 86. See App., *infra*, 1a-2a. Section 85 of the United States Code establishes the interest rates that national banks may charge. Section 86 establishes a cause of action and penalties for a violation of the substantive standards set by Section 85. As explained more fully below, it has long been established that the federal cause of action for usury in Section 86 is exclusive: it displaces any state-law usury claim asserted against a national bank. See, *e.g.*, *Farmers' & Mechs.' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 32-35 (1875).

b. The federal question jurisdiction statute provides that the federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. 1331 (reproduced at App., *infra*, 2a). The general federal removal statute provides that, absent an exception expressly created by Congress, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants" to the appropriate federal district court. 28 U.S.C. 1441(a); see 28 U.S.C. 1441(b) (any action "founded on a claim or right arising under" federal law "shall be removable") (reproduced at App., *infra*, 2a-3a). Thus, the removal statute permits a defendant to remove any action that arises under federal law.

2. a. Respondents were loan customers of petitioner Beneficial National Bank (Beneficial). Pet. App. 1a-2a. They sued Beneficial, its affiliate Beneficial Tax Masters, Inc. (also a petitioner), and H&R Block, Inc., in Alabama court. *Id.* at 21a-22a. Among other claims, respondents alleged that petitioners charged them excessive interest, in violation of Alabama Code §§ 8-8-1 *et seq.*, and the common law of usury. Pet. App. 2a & n.2. Respondents sought "compensatory and

punitive damages not to exceed $74,900 [each], in an amount to be determined by a jury." Compl. 11.

Petitioners and H&R Block removed the case to the United States District Court for the Middle District of Alabama, and respondents moved for a remand. Pet. App. 2a. Petitioners contended that removal was proper because respondents' usury claims necessarily arose under the federal cause of action created by 12 U.S.C. 86. The district court agreed, Pet. App. 21a-28a, but certified its decision for interlocutory appeal. *Id.* at 28a.

b. A divided panel of the United States Court of Appeals for the Eleventh Circuit reversed. Pet. App. 1a-20a. The court noted that the federal removal statute provides that any civil action brought in state court may be removed to federal district court provided the district court has jurisdiction. *Id.* at 5a. The court further noted that the district courts have federal question jurisdiction if a "properly pleaded complaint reveals that the claim is based on federal law." *Ibid.* The court explained that, under the "complete preemption" doctrine recognized by this Court, "a defendant may remove a case to federal court even though the plaintiff raises only state-law claims in her complaint, when 'the preemptive force of a [federal] statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim.'" *Ibid.* (quoting *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 393 (1987)).

The court of appeals recognized that the National Bank Act creates a cause of action for usury and that the cause of action created by the Act is exclusive. See Pet. App. 13a & n.12. In the court's view, however, "where there are no further indications of congressional intent to permit removal, the existence of an exclusive federal remedy generally will not be enough to achieve complete preemption." *Id.* at 14a. Reviewing the history surrounding the enactment of the National Bank Act in 1864, the court found that "the

congressional debates amply demonstrate Congress's desire to protect national banks from state legislation" (*id.* at 11a), but the court found no "clear congressional intent to make claims under the NBA removable" (*id.* at 13a). Because the court found no specific congressional intent to permit removal at the time of enactment of the National Bank Act, the court held that the complete preemption doctrine was inapplicable and removal was improper. *Id.* at 15a-16a. Judge Tjoflat dissented. *Id.* at 17a- 20a.

SUMMARY OF ARGUMENT

A. The general removal statute provides that, absent an express exception, any action filed in state court may be removed to federal court if "the district courts of the United States have original jurisdiction" over the action. 28 U.S.C. 1441(a). Here, removal is based on the original jurisdiction of the district courts over "[a]ny civil action * * * founded on a claim or right arising under the * * * laws of the United States." 28 U.S.C. 1441(b); see 28 U.S.C. 1331. Whether an action arises under the laws of the United States is determined by the well-pleaded complaint rule, which provides that federal jurisdiction exists only if a federal question is presented by the plaintiff's properly pleaded complaint. Because a defense is not part of the plaintiff's well-pleaded statement of his claim, it has long been established that a plaintiff may not obtain federal jurisdiction by anticipating and refuting a federal defense.

This Court has also recognized, as a corollary to the well-pleaded complaint rule, that a plaintiff may not defeat federal jurisdiction by the simple expedient of omitting to plead *necessary* federal questions. Although the plaintiff is generally master of the complaint, that principle does not allow a plaintiff to refuse to rely on a federal cause of action that occupies the field in which his claim arises. Thus, under the "complete preemption" or "artful pleading" doctrine, if a

federal cause of action completely preempts a state cause of action, any claim that falls within the scope of the federal cause of action necessarily "arises under" federal law and may be removed to federal court.

Under the terms of the removal statute, complete preemption occurs whenever Congress has created an exclusive federal cause of action and the plaintiff's claim, as presented in the facts set out in the complaint, falls within the scope of that federal cause of action. When federal law provides a cause of action that occupies the field in which the plaintiff's claim arises, the plaintiff's claim can arise only under federal law. And, as described above, the text of the removal statute clearly provides that any action "arising under" federal law "shall be removable" to federal court. 28 U.S.C. 1441(b).

B. This Court's precedents confirm that understanding. In *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968), the Court held that a state-law claim for breach of contract, based on an alleged breach of a collective bargaining agreement, was removable because it fell within the scope of Section 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. 185. As the Court later explained, "the necessary ground of decision was that the preemptive force of § 301 was so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'" *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983) (quoting 29 U.S.C. 185). In other words, Section 301 provides the exclusive cause of action for claims of breach of collective bargaining agreements, so those claims are removable even if couched in state-law terms.

The Court has repeatedly reaffirmed the *Avco* principle in later cases. Most notably, in *Metropolitan Life Insurance Co.* v. *Taylor*, 481 U.S. 58 (1987), the Court held that the state-law causes of action, which asserted improper processing of benefits claims under an employee benefit plan gov-

erned by the Employee Retirement Income Security Act of 1974 (ERISA), were "displaced by [Section 502(a)(1)(B) of ERISA, 29 U.S.C. 1132(a)(1)(B),] to the extent that complaints filed in state courts purporting to plead such state common law causes of action are removable to federal court." 481 U.S. at 60. Because a claim within the scope of Section 502(a) is "necessarily federal in character," it "'arise[s] under the . . . laws of the United States,' 28 U.S.C. § 1331, and is removable to federal court." *Id.* at 67.

C. The complete preemption rule advances the purposes of the removal statute. When a plaintiff invokes a claim within the scope of an exclusive federal cause of action but pleads the claim in state-law terms, the plaintiff suffers no legitimate harm from the recharacterization of the claim as a federal one supporting removal. Absent removal, the state court would have only two legitimate options—to recharacterize the claim in federal-law terms or to dismiss it altogether. Any plaintiff who truly seeks a recovery on that claim would prefer the first option, which would, of course, make the propriety of removal crystal clear. A third possibility, however, is that the state court would erroneously allow the claim to proceed under state law and thereby frustrate the federal policy embodied in the exclusive federal cause of action.

Moreover, complete preemption is not common. It arises only when a federal cause of action preempts the field in a particular area, and the claim alleged by the plaintiff falls within the preempted field. Field preemption is relatively rare, and field preemption accomplished through the provision of a federal cause of action is rarer still. In those circumstances, however, the plaintiff's claim necessarily arises under federal law and is therefore removable.

D. The application of the complete preemption rule to this case is straightforward. It has long been established that the National Bank Act, 12 U.S.C. 86, provides the exclusive

remedy for allegations of usury by national banks. This Court so held more than a century ago in *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U.S. 29, 32-35 (1875). The Court has repeatedly reaffirmed that holding, and it has become "well-settled law." Pet. App. 13a. The exclusive usury remedy is an instrumental component of the congressional design of the national banking system: a system of federally-chartered banks with federally-granted powers, operating under federal standards and subject to federal supervision, distinct and independent of the existing system of state banks. See *Talbott* v. *Silver Bow County*, 139 U.S. 438, 442-443 (1891); *Easton* v. *Iowa*, 188 U.S. 220, 229, 231-232 (1903). The National Bank Act created an exclusive usury remedy as part of that system and thereby deliberately set national banks apart from their state-chartered competitors and the state law of usury. See *Tiffany* v. *National Bank*, 85 U.S. (18 Wall.) 409, 412-413 (1873); *Marquette Nat'l Bank* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 314 (1978).

E. Because respondents have alleged usury by a national bank, their claim falls within the scope of the exclusive federal remedy provided by Section 86, and petitioners properly removed this case to federal court. The court of appeals erred in rejecting removal because of the absence of a specific congressional intent to permit removal of usury claims at the time of enactment of the National Bank Act. Although usury claims within the scope of Section 86 were not removable before Congress enacted the general federal question and removal statutes, they always involved exclusively federal claims. Thus, those claims became removable under the plain terms of those statutes. Specific congressional intent, in the National Bank Act, to make usury claims removable is not necessary because the removal statute itself evinces Congress's intent to permit removal of "any claim arising under" federal law. 28 U.S.C. 1441(b).

ARGUMENT

A CLAIM ALLEGING USURY BY A NATIONAL BANK NECESSARILY ARISES UNDER THE EXCLUSIVE CAUSE OF ACTION CREATED BY THE NATIONAL BANK ACT AND IS THUS REMOVABLE TO FEDERAL COURT

A. The Text Of The Removal Statute Makes Clear That Any Claim "Arising Under" Federal Law Is Removable, And A Claim Within The Scope Of An Exclusive Federal Cause Of Action Necessarily Arises Under Federal Law

1. The general federal removal statute provides that, absent an express exception, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants" to federal district court. 28 U.S.C. 1441(a). The federal question statute in turn provides that the district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. 1331. An action over which the district courts have jurisdiction based on federal question or "arising under" jurisdiction "shall be removable without regard to the citizenship or residence of the parties." 28 U.S.C. 1441(b). Thus, the removal statute permits a defendant to remove to federal court whenever the action is one "arising under" federal law within the meaning of Section 1331.

Although "arising under" jurisdiction as provided in the United States Constitution, Article III, Section 2, extends to any case in which federal law potentially "forms an ingredient," *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824), statutory "arising under" jurisdiction is more limited. See *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 8 & n.8 (1983). The

outer boundaries of the statutory jurisdiction are not precisely defined, but it is well established that a claim arises under federal law if federal law "creates the cause of action." *Id.* at 9 (quoting *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)).

The plaintiff is generally "the master of the claim." *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392 (1987). Thus, if both federal and state law provide remedies for the wrong the plaintiff has allegedly suffered, the plaintiff may obtain federal jurisdiction by raising the federal claim or, conversely, "may avoid federal jurisdiction by exclusive reliance on state law." *Ibid.* The plaintiff may not, however, obtain federal jurisdiction by anticipating and refuting a federal defense. Under the "well-pleaded complaint" rule, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Ibid.*; see *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908). And, because removal jurisdiction is available only when the district courts have original jurisdiction, a defendant cannot remove a case to federal court based on a federal defense, including a defense that the plaintiff's state-law claim is preempted, "even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Rivet* v. *Regions Bank*, 522 U.S. 470, 475 (1998) (quoting *Franchise Tax Bd.*, 463 U.S. at 14).

An "independent corollary" to the well-pleaded complaint rule is the parallel principle that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Rivet*, 522 U.S. at 475 (quoting *Franchise Tax Bd.*, 463 U.S. at 22); *Caterpillar*, 482 U.S. at 393. Thus, "[i]f a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law" and may be removed to federal court. *Caterpillar*, 482 U.S. at

393 (quoting *Franchise Tax Bd.*, 463 U.S. at 24). The Court has described this application of the well-pleaded complaint rule as the "artful pleading" or "complete preemption" doctrine. See *ibid.*; *Rivet*, 522 U.S. at 475.

2. "Complete preemption" occurs when (1) Congress has created an exclusive federal cause of action and, (2) under the facts set out in the complaint, the plaintiff's claim comes within the scope of that cause of action. That conclusion follows from the plain language of the removal statute. When federal law provides a cause of action that occupies the field in which the plaintiff's claim arises, the plaintiff's claim can arise only under federal law. And, as described above, the text of the removal statute clearly provides that any action "arising under" federal law "shall be removable" to federal court. 28 U.S.C. 1441(b).

An exclusive federal cause of action that gives rise to complete preemption is rare. Complete preemption does not result whenever federal law conflicts with state law and therefore preempts it, or even whenever federal law occupies a field and thereby displaces all state law within that field. See generally *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (distinguishing between conflict and field preemption). Conflict preemption and ordinary field preemption are only defenses to state-law claims and, as discussed above, such federal defenses do not provide a basis for removal. Conflict preemption is a defense because, even if state law is preempted because it conflicts with federal law, the plaintiff must "prove that the state-law [would result in liability on the part of the defendant] before the question will be reached whether anything in its provisions or in administrative conduct under it is inconsistent with the federal" law. *Franchise Tax Bd.*, 463 U.S. at 11 (quoting *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 117 (1936)). Field preemption is likewise generally a defense because, except in the unusual circumstances in which the

federal law that occupies the field itself creates a substitute and exclusive cause of action, field preemption "does not transform the plaintiff's state-law claims into federal claims but rather extinguishes them altogether." *Rivet*, 522 U.S. at 476.

When, however, a federal cause of action itself has field preemptive effect, and the plaintiff asserts a claim within the scope of that cause of action, the claim, "although purportedly based on * * * preempted state law," necessarily arises under the exclusive federal cause of action, and "therefore arises under federal law." *Caterpillar*, 482 U.S. at 393. In that circumstance, because the plaintiff's claim actually arises under federal law, the federal district courts have original jurisdiction, and the removal statute authorizes the defendant to remove the case to federal court.[1]

B. This Court's Cases Confirm That A Claim Within The Scope Of An Exclusive Federal Cause Of Action Is Removable Even If The Claim Does Not Purport To Rely On Federal Law

The Court's precedents in the complete preemption area confirm that a case is removable if, under the facts alleged in the complaint, the plaintiff's claim falls within the scope of an exclusive federal cause of action, even if the complaint does not expressly invoke federal law. The Court first addressed the issue in *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968). In *Avco*, an employer sued a union in state court for breach of contract based on the union's alleged breach of a "no strike" clause in a collective bargaining agreement. *Id.*

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[1] If the district courts have jurisdiction over any of a plaintiff's claims, those courts also have jurisdiction over "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. 1367(a) (reproduced at App., *infra*, 3a). That jurisdiction is unaffected by whether the supplemental claims involve "additional parties." *Ibid.*

at 558. Section 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. 185, provided a cause of action for breach of the agreement, but the employer did not invoke that cause of action in its complaint and sought relief (an injunction) that was available only under state law. See *Franchise Tax Bd.*, 463 U.S. at 23.

This Court held that the employer's claim "arose under" Section 301 of the LMRA, even though "the plaintiff had undoubtedly pleaded an adequate claim for relief under the state law of contracts and had sought a remedy available *only* under state law." *Franchise Tax Bd.*, 463 U.S. at 23. See *Avco*, 390 U.S. at 560-561. As the Court subsequently explained, "the necessary ground of decision was that the preemptive force of § 301 was so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'" *Franchise Tax Bd.*, 463 U.S. at 23 (quoting 29 U.S.C. 185). In other words, Section 301 of the LMRA supplies the *exclusive* cause of action for claims of breach of collective bargaining agreements. For that reason, "[a]ny * * * suit [within the scope of Section 301] is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301." 463 U.S. at 23.[2]

The Court next addressed complete preemption in *Franchise Tax Board*. California's Franchise Tax Board, the agency charged with enforcement of the State's income tax, brought suit in state court to collect unpaid taxes from the Construction Laborers Vacation Trust (CLVT), an employee

[2] As *Avco* makes clear, a claim may fall within the scope of an exclusive federal cause of action, and thus be removable, even if a federal court cannot award the remedy sought. *Caterpillar*, 482 U.S. at 391 n.4; Richard Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and The Federal System* 950 n.3 (1996). Indeed, Congress may decide to create an exclusive cause of action precisely in order to control the available remedies.

welfare benefit plan. 463 U.S. at 4-5. The Board's complaint included two state-law claims: one for back taxes and another for a declaration that CLVT's tax obligations were not preempted by Section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144(a). 463 U.S. at 5-7. CLVT removed the case to federal district court, but this Court held that the case was not properly removable. *Id.* at 7.

In reaching that holding, the Court rejected an argument by CLVT that, under *Avco*, the Board's causes of action were, "in substance, federal claims" because they necessarily arose under ERISA. 463 U.S. at 22-27. The Court reaffirmed that "it is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." *Id.* at 22. The Court explained that "*Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law" and thus permits removal. *Id.* at 23-24. Moreover, the Court acknowledged that Section 502(a) of ERISA may completely preempt some state-law causes of action. *Id.* at 24. Nonetheless, the Court found it unnecessary to decide that question, because the causes of action brought by the Board did not "come[] within the scope of" any of the "causes of action" created by Section 502(a), and therefore the case was not removable. *Id.* at 25.

In *Metropolitan Life Insurance Co.* v. *Taylor*, 481 U.S. 58 (1987), the Court confronted the issue it had reserved in *Franchise Tax Board*—whether Section 502(a) of ERISA displaces state-law claims within its scope so that those claims necessarily arise under federal law and are removable. *Taylor* involved state common-law causes of action asserting improper processing of a claim for benefits under an ERISA plan. *Id.* at 60. In *Pilot Life Insurance Co.* v.

Dedeaux, 481 U.S. 41 (1987)—decided the same day as *Taylor*—the Court held that such state-law claims are pre-empted under Section 514(a) of ERISA because they "relate to" an employee benefit plan and do not fall within ERISA's "savings clause." See *Pilot Life*, 481 U.S. at 47-56; *Taylor*, 481 U.S. at 60. *Pilot Life*'s holding, however, merely established that Section 514(a) of ERISA provides a defense to those claims, which is not sufficient to permit removal. See p. 9, *supra*; *Taylor*, 481 U.S. at 64 ("ERISA pre-emption, without more, does not convert a state claim into an action arising under federal law.") (citing *Franchise Tax Bd.*, 463 U.S. at 25-27). Thus, the question facing the Court in *Taylor* was whether such state-law claims are "also displaced by [Section 502(a)(1)(B) of ERISA] to the extent that complaints filed in state courts purporting to plead such common law causes of action are removable to federal court under 28 U.S.C. § 1441(b)." 481 U.S. at 60.

After observing that the claims were "within the scope of § 502(a)," the Court framed the question as whether Section 502(a) has "that extraordinary pre-emptive power, such as been found with respect to § 301 of the LMRA, that converts an ordinary state common law complaint into one stating a federal claim." *Id.* at 64-65. The Court held that Section 502(a) has that preemptive power because its language and legislative history reveal that it was modeled on Section 301. *Id.* at 65-66. Based on those considerations, the Court found a "clear intention to make § 502(a)(1)(B) suits brought by participants or beneficiaries federal questions for purposes of federal court jurisdiction." *Id.* at 66. The Court therefore concluded that "this suit, though it purports to raise only state law claims, is necessarily federal in character by virtue of the clearly manifested intent of Congress. It, therefore, 'arise[s] under the . . . laws . . . of the United States,' 28 U.S.C. § 1331, and is removable to federal court." *Id.* at 67.

The Court addressed complete preemption again in *Caterpillar*. There, the Court held that state-law claims for breach of individual employment contracts were not completely preempted by Section 301 of the LMRA because the claims did not fall within the scope of Section 301. 482 U.S. at 388-399. The Court explained that, although the plaintiffs could have alleged facts that showed a breach of their collective bargaining agreement, they had not done so, and complete preemption principles do not "justify removal on the basis of facts not alleged in the complaint." *Id.* at 397. At the same time, the Court reaffirmed that, when a plaintiff does invoke a state-law claim "that comes within the scope of the federal cause of action," that claim "is considered, from its inception, a federal claim," because Section 301 "displace[s] entirely any state cause of action" within its scope. *Id.* at 393-394 (quoting *Franchise Tax Bd.*, 463 U.S. at 23-24); see *id.* at 399.

The Court most recently addressed complete preemption in *Rivet*, which held that the federal affirmative defense of claim preclusion does not provide a basis for removal of the allegedly preempted state-law claim. 522 U.S. at 476-478. The Court explained that "[a] case blocked by the claim preclusive effect of a prior federal judgment differs from the standard case governed by a completely preemptive federal statute in this critical respect: The prior federal judgment does not transform the plaintiff's state-law claims into federal claims but rather extinguishes them altogether." *Id.* at 476. In other words, claim preclusion does not result in complete preemption because, although the plaintiff's state claims are barred by federal law, federal law does not provide a substitute, exclusive cause of action.

The Court's cases thus confirm that two conditions must be met to render a claim that has been pleaded as a state-law claim necessarily federal in character and therefore removable: (1) There must be a federal cause of action that is

exclusive in that it displaces any state-law claim within its scope; and, (2) under the facts alleged in the complaint, the plaintiff's claim must come within the scope of that federal cause of action. If those two conditions are satisfied, the principle that federal jurisdiction is determined based on a *well-pleaded* complaint dictates that the plaintiff's claim necessarily arises under the exclusive federal cause of action, and the case thus may be removed.

C. The Rule That A Claim Within The Scope Of An Exclusive Federal Cause Of Action Is Removable Advances The Purposes Of The Removal Statute

The complete preemption rule reflected in the Court's cases advances the purposes of the removal statute without trenching on the legitimate rights of plaintiffs or offending principles of comity and federalism. The purposes of federal question removal jurisdiction are essentially twofold: (1) to ensure the availability of a forum with special expertise in federal law in order to promote its accurate and uniform interpretation, and (2) to protect the federal rights of defendants. See *Boys Mkts., Inc.* v. *Clerks Union*, 398 U.S. 235, 246-247 & n.13 (1970). Removal jurisdiction enables defendants, as well as plaintiffs, to choose to have federal district courts resolve cases that turn on federal law. At the same time, removal jurisdiction provides "for the protection of defendants who might be entitled to try their rights, or assert their privil[e]ges, before [a federal] forum." *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816).

The complete preemption doctrine ensures that, in the rare circumstances in which Congress creates an exclusive federal cause of action, defendants retain access to a federal forum to litigate federal claims even when plaintiffs—artfully or inadvertently—incorrectly characterize those claims as arising under state law. Although the availability of review in this Court serves the same interests as removal

jurisdiction, see *Martin*, 14 U.S. (1 Wheat.) at 347-348, it alone cannot fully safeguard those interests, for two reasons. First, the resources of the Court are limited, so removal may, as a practical matter, be the only opportunity for the defendant to obtain access to a federal forum. See David P. Currie, *Federal Courts: Cases and Materials* 160 (3d ed. 1982); Richard E. Levy, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. Chi. L. Rev. 634, 636 n.10 (1984). Second, limiting defendants to this Court's review "would deny [them] the benefit of a federal trial court's role in constructing a record and making fact findings," and "[h]ow the facts are found will often dictate the decision of federal claims." *England* v. *Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411, 416 (1964).

At the same time that the complete preemption rule advances the purposes of removal jurisdiction, it does not trench on the legitimate rights of plaintiffs. As the Court made clear in *Caterpillar*, even when Congress has created an exclusive federal cause of action covering a certain area, the plaintiff's claim will not be completely preempted if it does not depend on facts that give rise to a claim in that area. 482 U.S. at 394-395, 397. Moreover, in the great many situations in which the federal cause of action is not exclusive, the plaintiff can avoid federal jurisdiction by suing only under state law. See *id.* at 392 & n.7.

When the plaintiff invokes a claim within the scope of an exclusive federal cause of action but pleads the claim in state-law terms, the plaintiff suffers no legitimate harm by the recharacterization of the claim as a federal one permitting removal. Absent removal, the state court would have only two legitimate options—to recharacterize the claim in federal-law terms or to dismiss the claim altogether. Any plaintiff who truly seeks a recovery on that claim would prefer the first option, which would make the propriety of

removal crystal clear. A third possibility, however, is that the state court would err and allow the claim to proceed under state law notwithstanding Congress's decision to make the federal cause of action exclusive. The complete preemption rule avoids that potential error.

The complete preemption rule nonetheless respects the prerogatives of state courts. The rule does not provide for removal when state law provides the cause of action and federal law provides only a defense—whether the defense is that the state cause of action is unconstitutional or that it is otherwise precluded by federal law. Thus, the complete preemption doctrine preserves both state court primacy in resolving questions of state law and state court authority to determine in the first instance whether state law must yield to a federal law defense. The doctrine calls for removal only when the cause of action is necessarily federal.

Of course, when a defendant removes a case under the complete preemption rule, state courts will not decide whether Congress has created an exclusive federal cause of action or whether a particular claim is within its scope. But those are federal questions, like all questions about whether a case is removable. See *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 104 (1941). It no more intrudes on state court jurisdiction for federal courts to decide those questions than it does for federal courts to decide the other questions about removal that are committed to them—such as whether the party seeking removal is properly characterized as a defendant, *Chicago, Rock Island, & Pac. R.R.* v. *Stude*, 346 U.S. 574, 580 (1954); whether there is fraudulent joinder, *Pullman Co.* v. *Jenkins*, 305 U.S. 534, 541 (1939); whether there is complete diversity, *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 68-70 (1996); or whether there is in fact no federal cause of action but only a federal defense, *Gold-Washing & Water Co.* v. *Keyes*, 96 U.S. 199 (1877).

For the same reasons that the complete preemption rule respects the autonomy of state courts, it does not allow undue access to the federal courts. As explained above, it permits removal only when federal law creates the cause of action—when federal law provides not just "a shield but * * * an 'exclusive' federal sword as well." Richard Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and The Federal System* 950 (1996). Thus, it allows removal only of claims that would clearly have been removable had they been properly pleaded.

Complete preemption also does not arise frequently. As described above, it arises only when a federal cause of action preempts the field in a particular area, and the claim alleged by the plaintiff falls within the preempted field. Field preemption is relatively rare. It occurs only when displacement of state law is "the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). And field preemption accomplished through the provision of a federal cause of action is rarer still.[3]

In those circumstances, however, federal law necessarily provides the plaintiff's cause of action. And where federal law provides the plaintiff's cause of action, the case is not only certain to require the resolution of federal questions but

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[3] Congress sometimes occupies a field in order to provide a comprehensive administrative remedy. See, *e.g.*, *Hawaiian Airlines, Inc.* v. *Finazzo*, 512 U.S. 246 (1994) (collective bargaining disputes under Railway Labor Act, 45 U.S.C. 151a, 153); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959) (activities arguably protected or prohibited by the National Labor Relations Act, 29 U.S.C. 157, 158). Congress also sometimes occupies a field and provides only a limited administrative remedy or no remedy at all. See, *e.g.*, *United States* v. *Locke*, 529 U.S. 89, 110-111 (2000) (Title II, Ports and Waterways Safety Act, 46 U.S.C. 3703); *American Airlines* v. *Wolens*, 513 U.S. 219, 222-224 (1995) (Airline Deregulation Act of 1978, 49 U.S.C. 41713). In those circumstances, there is no removal under complete preemption principles because there is no substitute federal cause of action that gives the federal district courts original jurisdiction.

those questions will determine the outcome. See Levy, *supra*, 51 U. Chi. L. Rev. at 638-641. It is therefore entirely appropriate for the case to be resolved in federal court.[4]

Finally, the complete preemption rule, when properly understood, is not difficult to administer. That is not to say that the question whether a particular federal cause of action is exclusive may not sometimes be difficult, or that determining its scope may not sometimes present challenges. But those questions are familiar to the courts because they are the types of questions that the courts frequently face in resolving questions of field preemption. Thus, the courts should not have difficulty in applying the same principles to resolve questions of complete preemption.[5]

D. The National Bank Act Creates The Exclusive Cause Of Action For Usury By A National Bank, And Respondents' Usury Claim Falls Within the Scope Of That Cause of Action

The application of the complete preemption rule to this case is straightforward. It has long been established that the National Bank Act provides the exclusive remedy for allegations of usury by national banks, displacing any state causes of action, and respondents' complaint plainly alleges

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[4] Several courts of appeals have understood complete preemption to operate in essentially the manner described in this brief. See, *e.g.*, *Vorhees* v. *Naper Aero Club, Inc.*, 272 F.3d 398, 402-404 (7th Cir. 2001); *Schmeling* v. *Nordam*, 97 F.3d 1336, 1342 (10th Cir. 1996); *M. Nahas & Co.* v. *First Nat'l Bank*, 930 F.2d 608, 612 (8th Cir. 1991). There is no indication that their approach has led to an excessive number of removals to federal court or to any friction with state courts.

[5] Commentators have noted a "wide divergence among lower federal courts as to the contexts in which complete preemption is applicable." 14B Charles A. Wright et al., *Federal Practice and Procedure: Jurisdiction 3d* § 3722.1, at 553 (1998). But the disagreement among the lower courts does not stem from difficulty in administering the complete preemption test described in this brief but from "different judicial formulations" of the complete preemption test. *Ibid.*

that petitioner Beneficial, a national bank, committed usury. Thus, even though respondents have cast that claim as arising under Alabama law, it necessarily arises under the National Bank Act, and petitioners properly removed the case to federal court.

1. Section 30 of the National Bank Act prescribes the interest rates that national banks may charge, and establishes a cause of action for usury. The substantive rates are set out in 12 U.S.C. 85, and the cause of action is found in 12 U.S.C. 86. Under Section 86, a national bank that charges more than the rate allowed by Section 85 forfeits the entire interest on the debt. If the interest has already been paid, the person who paid the interest (or his representative) may bring an action to recover twice the amount of interest paid. The action must be brought within two years of the usurious transaction.

As the court of appeals acknowledged, it is "well-settled law that § 86 provides the exclusive remedy for usury claims against a national bank." Pet. App. 13a. This Court so held in 1875, only a decade after the National Bank Act was enacted in 1864. In *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U.S. 29 (1875), the loan customer urged that the penalty for usury by a national bank should be forfeiture of the entire debt—as provided under New York law—rather than the more lenient penalties set out in Section 86. This Court held that a State has no power to supplement the remedies established by the National Bank Act, which "can be only that which the statute prescribes." *Id.* at 35. The Court explained that the provisions of Section 86 "form a system of regulations. All parts are in harmony with each other, and cover the entire subject." *Id.* at 32. In addition, because national banks "are instruments designed to be used to aid the government in the administration of an important branch of the public service," state legislation that could interfere with them is permitted only if expressly or im-

pliedly authorized by Congress. *Id.* at 34-35. The Court concluded that, "[i]n any view that can be taken of the [federal cause of action for usury], the power to supplement it by State legislation is conferred neither expressly nor by implication." *Id.* at 35.

The Court confirmed the exclusivity of the usury remedy four years later in *Barnet* v. *National Bank*, 98 U.S. 555 (1878). In that case, a national bank sued to recover on a loan, and the customer's assignees attempted to assert, by way of counterclaim, a claim for usury. The Court held that the counterclaim was defective because "the remedy given by [the National Bank Act] is a penal suit." *Id.* at 559. As the Court explained, "[t]o that the party aggrieved or his legal representative must resort," and he "can have redress in no other mode or form of procedure." *Ibid.* In reaching its decision, the Court noted that any state statutes "upon the subject of usury may be laid out of view" because "[t]hey cannot affect the case." *Id.* at 558. The provisions of the National Bank Act "alone apply. Such provisions are exclusive." *Ibid.*

The Court has repeatedly reaffirmed the exclusivity of the National Bank Act's usury remedy. In *Haseltine* v. *Central National Bank*, 183 U.S. 132 (1901), as in *Barnet*, borrowers sought to set off allegedly usurious interest that they had paid against a judgment in favor of the bank for their failure to repay a promissory note. In rejecting that claim, the Court stated that, "as the note in question was given to a national bank, the definition of usury and the penalties affixed thereto must be determined by the national banking act, and not by the law of the state." *Id.* at 134. See *Evans* v. *National Bank*, 251 U.S. 108, 109 (1919) (Because "[r]espondent is a national bank, * * * whether transactions by it are usurious and the consequent penalties therefor, must be ascertained upon a consideration of the National Bank Act.").

Likewise, in *McCollum* v. *Hamilton National Bank*, 303 U.S. 245 (1938). the Court held that the penalty for usury under Section 86 "does not depend upon payment of the borrower's debt." *Id.* at 249. Thus, a bank may not satisfy a judgment for usury by deducting the amount of the penalty from the bank's claim against the bankrupt borrower's estate. See *id.* at 248. The Court stressed that the "right of set-off here involved does not at all depend upon the Tennessee statute upon which, at least in part, the state supreme court rested its ruling." *Ibid.* The National Bank Act defines "petitioner's right to recover, and respondent's liability for, the penalty." *Ibid.*

Decisions of the state courts and the federal courts of appeals are also replete with statements recognizing that "Section 86 provides the sole remedy for the recovery of usurious interest paid to a national bank" (*Community Bank & Trust, N.A.* v. *Keyser*, 285 S.E.2d 424, 429 (W. Va. 1981)), and that the federal remedy "preempts the field" (*First Nat'l Bank* v. *Nowlin*, 509 F.2d 872, 881 (8th Cir. 1975)). See 10 Am. Jur. 2d *Banks and Financial Institutions* § 517, at 445 & n.89 (2002) (citing cases). Indeed, over 70 years ago, the Vermont Supreme Court remarked that the fact "[t]hat the provisions of [Sections 85 and 86] superseded all state laws on the subject of interest and usury paid to national banks is now too well established to require discussion." *Cohen* v. *Welden Nat'l Bank*, 146 A. 252, 253 (Vt. 1929).

2. The exclusivity of the usury remedy provided by Section 86 furthers important purposes behind the National Bank Act. That Act was enacted to create a system of national banks, capable of operating nationwide, under federally-established standards, in order to provide a sound and stable system of banking institutions to support national economic development and establishment of a uniform national currency. See *Talbott* v. *Silver Bow County*, 139 U.S. 438, 442-443 (1891). The National Currency Act, Act of Feb.

25, 1863, ch. 58, 12 Stat. 665, provided for a national currency circulated by a new system of banks chartered by a Treasury Department bureau headed by the Comptroller of the Currency. In 1864, based largely on the Comptroller's recommendations for improving the Currency Act to encourage expansion of the national bank system, Congress enacted the National Bank Act, ch. 106, 13 Stat. 99. See Ross M. Robertson, *The Comptroller and Bank Supervision* 30-54 (1995). The legislative debate reflected a congressional assessment that the National Bank Act was important to the nation's survival and that threats to the new banking system from state banks and state legislation should be reduced or eliminated.[6]

Congress thus sought to ensure a national banking system nationwide in scope and uniform in character that could not be disrupted by state legislation. As this Court explained in *Easton* v. *Iowa*, 188 U.S. 220, 229 (1903), the National Bank Act had "in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose restrictions as various and as numerous as the states." The provision fixing the rate of interest that a national bank could charge on its loans and the remedy for exceeding that rate was a prominent feature of the Act. Because loans typically constitute the predominant asset on a bank's balance sheet, interest is a principal component of virtually every bank's income. Congress thus recognized that state manipulation of usury laws in ways

[6] See, *e.g.*, Cong. Globe, 38th Cong., 1st Sess. 1451 (1864) (Cong. Hooper); *id.* at 1893-1894 (Sen. Sumner); *id.* at 1897 (Sen. Sherman); *id.* at 2128-2129 (Sen. Sumner); *id.* at 2130 (Sen. Chandler).

that disadvantaged national banks could impair their survival and prosperity.[7]

As this Court has explained, the usury provisions were "intended to give [national banks] a firm footing in the different States where they might be located. It was expected they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition." *Tiffany* v. *National Bank*, 85 U.S. (18 Wall.) 409, 412 (1873). The usury provisions were "considered indispensable to protect them against possible unfriendly State legislation" and "ruinous competition with State banks." *Id.* at 412-413. Indeed, Congress chose to give "advantages to National banks over their State competitors" by allowing a national bank to charge the highest interest rate allowed to any lender by the laws of the State in which bank is located, whether or not that rate is available to state banks. *Id.* at 413; see 12 U.S.C. 85; *Marquette Nat'l Bank* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 314 & n.26 (1978).

The Comptroller, in his report recommending changes to the Currency Act, had compared state power to regulate usury by national banks to state power to tax the Bank of the United States, which this Court, in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819), described as "the power to destroy." See Office of the Comptroller of the Currency, *Report of the Secretary of the Treasury on the State of the Finances* 53 (1863). The Comptroller stated that, unless Congress regulated usury by national banks, "State laws might so control or impede the business of the banks as to render the act itself practically inoperative." *Ibid.* The Comptroller also thought it critical to fix a reasonable nationwide penalty for usury by national banks,

[7] See, *e.g.*, Cong. Globe, 38th Cong., 1st Sess. 1375 (1864) (Cong. Pike); *id.* at 1376 (Cong. Miller); *id.* at 2124 (Sen. Sherman); *id.* at 2125 (Sen. Pomeroy); *id.* at 2126 (Sen. Sherman).

and he criticized "the more stringent laws of some States and the less stringent ones of others." *Id.* at 54. Thus, an exclusive federal cause of action with distinct federal remedies was critical to address the problems identified by the Comptroller. Congress's response was the exclusive usury remedy of the National Bank Act.

3. Respondents' complaint clearly alleges a claim that falls within the scope of that exclusive remedy. Count IV of the complaint, entitled "Usury Violations," alleges that petitioners "charged each [respondent] excessive interest" and that respondents suffered damages by "paying excessive interest" to petitioners. Compl. 11. That claim necessarily arises under the National Bank Act, 12 U.S.C. 86.

E. The Court Of Appeals Erred By Requiring Specific Evidence That Congress, When It Enacted The National Bank Act, Intended To Allow Removal Of Usury Claims

Because respondents' usury claim necessarily arises under the exclusive federal remedy provided by Section 86, petitioners properly removed the case to federal court. The court of appeals did not dispute that Section 86 provides an exclusive remedy or that respondents' claim falls within its scope. Rather, the court held that, "where there are no further indications of congressional intent to permit removal, the existence of an exclusive federal remedy generally will not be enough to achieve complete preemption." Pet. App. 14a. In particular, the court found it dispositive that the legislative history of the National Bank Act does "not demonstrate that Congress desired to protect national banks from facing suit in state court." *Id.* at 11a. In looking for a congressional intent to keep usury cases out of state court, the court of appeals focused on the wrong question. The relevant question is not whether Congress specifically intended to permit removal when it enacted the National Bank

Act but whether Congress intended usury claims against national banks to arise exclusively under federal law. Because Congress did so intend, such claims fall squarely within the terms of the removal statute.

1. As the court of appeals observed, plaintiffs who invoke the cause of action in Section 86 may sue either in federal or in state court. See Pet. App. 12a n.11 (describing the venue provision of National Bank Act). Accordingly, before passage of the general removal statute, even actions expressly brought under Section 86—which undisputably stated federal claims—could not be removed, because Congress had not yet authorized their removal. There can be no doubt, however, that actions brought under Section 86 *became removable* when Congress enacted the general federal question and removal statutes, because those actions arise under federal law and thus fall squarely within the terms of the removal statute.

By the same token, actions that purport to allege state-law usury claims against national banks *became removable* when Congress enacted the general federal question and removal statutes.[8] Specific congressional intent to make usury claims removable is not necessary because the removal statute itself evinces Congress's intent to permit removal of "any claim arising under" federal law. 28 U.S.C. 1441(b); see 28 U.S.C. 1331, 1441(a). The well-pleaded complaint rule and its corollary, the complete preemption doctrine, are interpretations of the "arising under" language of the federal question and removal statutes. Whether or not a claim could have been removed before those statutes were enacted is not relevant to whether the claim "aris[es] under"

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[8] Although such claims, like usury claims expressly brought under the National Bank Act, were not removable before passage of the general federal removal statute, they were nonetheless necessarily federal claims. Thus, a state court should have recharacterized any such claim as a claim under the National Bank Act.

federal law within the meaning of those statutes. And consequently it is not relevant to whether the claim is removable under those statutes.

2. This Court's cases do not require a different conclusion. In *Avco*, the Court held that claims within the scope of Section 301 of the LMRA are removable because they are claims "arising under the 'laws of the United States' within the meaning of the removal statute." 390 U.S. at 560. The Court concluded that those claims arise under federal law because Section 301 "displace[s] entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'" *Franchise Tax Bd.*, 463 U.S. at 23. In deciding *Avco*, the Court did not inquire into the presence or absence of any specific congressional intent to permit removal of claims under Section 301. Nor did the Court indicate that specific intent to permit removal is required when the Court described *Avco* and applied the complete preemption doctrine in *Franchise Tax Board*, *Caterpillar*, and *Rivet*.

The Court did refer to congressional intent as a "touchstone" of its removal analysis in *Taylor*. See 481 U.S. at 66 (noting that "Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court"); see also *id.* at 67-68 (Brennan, J., joined by Marshall, J., concurring). And the Court noted that, without some indication that Congress intended to employ "extraordinary preemptive power," the question before it would be a close one. *Id.* at 64, 65. But an examination of the Court's reasoning reveals that the Court was really inquiring into congressional intent that claims within the scope of Section 502(a) necessarily arise under federal law, not congressional intent on the specific issue of removal.

In answering that question, the Court relied on the fact that the language of the ERISA provision that gives the federal courts jurisdiction over claims under Section 502(a) "closely parallels" the language of Section 301, which had been held to result in complete preemption in *Avco*. *Id.* at 66. The Court also relied on a statement in Section 502(a)'s legislative history that all actions within its scope "*are to be regarded as arising under the laws of the United States, in similar fashion to those brought under section 301.*" *Ibid.* The Court noted that "[n]o more specific reference to the *Avco* rule can be expected," even though the statement focused on the claims' status as arising under federal law, rather than their removal status. Indeed, the Court characterized the legislative history that it had reviewed as demonstrating Congress's "clear intention to make [Section 502(a) suits] federal questions for the purposes of federal court jurisdiction." 481 U.S. at 66. And, once the Court determined that claims within the scope of Section 502(a) are "necessarily federal in character by virtue of the clearly manifested intent of Congress," *id.* at 67, the Court readily concluded that those claims are "removable to federal court" because they "arise[] under the . . . laws . . . of the United States." *Ibid.* (quoting 28 U.S.C. 1331 and citing 28 U.S.C. 1441(b)).

The principal difference between this case and *Taylor* is that, unlike the exclusivity of Section 502(a), which was an unresolved question at the time the Court decided *Taylor* and its companion case, *Pilot Life*, the exclusive nature of Section 86 of the National Bank Act has long been established. Claims alleging usury by a national bank therefore clearly "arise[] under the . . . laws . . . of the United States" and are removable to federal court. 481 U.S. at 67.

Indeed, even if a finding of complete preemption requires something more than the conclusion that Congress created an exclusive cause of action that displaces state-law causes of action, the usury remedy under the National Bank Act satisfies that requirement. As described above, Congress

created an exclusive federal usury remedy precisely to avoid subjecting national banks to the potentially draconian remedies of state usury law. State-law actions that are "artfully pled" to avoid federal law expose national banks to the very danger that Congress sought to avoid.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY APPENDIX

1. Section 85 of Title 12, United States Code, provides:

§ 85. Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under title 62 of the Revised Statutes. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place

than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

2. Section 86 of Title 12, United States Code, provides:

§ 86. Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided,* That such action is commenced within two years from the time the usurious transaction occurred.

3. Section 1331 of Title 28, United States Code, provides:

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

4. Section 1441 of Title 28, United States Code, provides in relevant part:

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants to the district court of the United States for the district and

division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

* * * * *

5. Section 1367(a) of Title 28, United States Code, provides:

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

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In The
Supreme Court of the United States

BENEFICIAL NATIONAL BANK AND
BENEFICIAL TAX MASTERS, INC.,

Petitioners

v.

MARIE ANDERSON, *et al.*

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

BRIEF FOR THE AMERICAN BANKERS ASSOCIATION, AMERICA'S COMMUNITY BANKERS, CONSUMER BANKERS ASSOCIATION, AND FINANCIAL SERVICES ROUNDTABLE, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
A COMPLAINT ALLEGING THAT THE RATE OF INTEREST PAID TO A NATIONAL BANK IS UNLAWFUL NECESSARILY "ARISES UNDER" FEDERAL LAW BECAUSE CONGRESS CREATED AN EXCLUSIVE FEDERAL CAUSE OF ACTION FOR SUCH CLAIMS AS PART OF A BROADER SCHEME TO PROMOTE AND PROTECT THE FINANCIAL SOUNDNESS OF NATIONAL BANKS	6
A. A Complaint That Challenges The Rate Of Interest Paid To A National Bank "Arises Under" The National Bank Act And Is Removable To Federal Court	7
1. Congress provided in the National Bank Act that the rate of interest charged for loans by national banks shall be governed only by federal law	8
2. Congress created a federal cause of action in the National Bank Act for individuals who have paid interest rates that are in excess of those allowed under federal law, and intended that it be an exclusive remedy	11

TABLE OF CONTENTS – Continued

Page

3. Respondents' complaint "arises under" the National Bank Act and was properly removed to federal court 12

B. A Complaint Necessarily "Arises Under" Federal Law Even If It Expressly Invokes Only A State Cause Of Action And Fails To Cite The Exclusive Federal Cause Of Action That Was Enacted In Its Stead 14

1. Federal courts are not bound by the face of the pleadings in determining federal jurisdiction 16

2. A complaint alleging a state law claim and seeking a state law remedy that has been displaced by a federal cause of action necessarily "arises under" federal law 17

C. Removal To Federal Court Of Complaints Challenging The Rate Of Interest Charged By National Banks Furthers The Comprehensive Regulatory Scheme Established By Congress Over National Banks By Promoting Uniformity And Reducing The Costs Of Litigation 20

1. The OCC engages in extensive examinations of each national bank to ensure compliance with federal law, including federal limits on interest rates, and requires corrective action whenever violations are found 21

TABLE OF CONTENTS – Continued

Page

2. Litigation in state courts involving the interest rates paid to national banks is likely to lead to a lack of uniformity concerning the requirements of the National Bank Act and the propriety of determinations by the OCC, thereby increasing the costs and uncertainty of litigation 23

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Ament v. PNC Nat'l Bank, 825 F. Supp. 1243 (W.D. Pa. 1992).....24

American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916).....13

Atherton v. FDIC, 519 U.S. 213 (1997).....9

Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968).....4, 18

Barnet v. National Bank, 98 U.S. 555 (1878).....12, 24

Bartholet v. Reishauer A.G., 953 F.2d 1073 (7th Cir. 1992).....15

Beeman v. MBank Houston, N.A., 691 F. Supp. 1027 (S.D. Tex. 1988).....24

Bell v. Hood, 327 U.S. 678 (1946).....14

Burnham v. Superior Ct., 495 U.S. 604 (1990).....20

Caterpillar Inc. v. Williams, 482 U.S. 386 (1987).....17

Chicago, Rock Island & Pacific Ry. Co. v. Schwyhart, 227 U.S. 184 (1913).....16

City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941).....16

Copeland v. MBNA Am., N.A., 820 F. Supp. 537 (D. Colo. 1993).....24

Cutler v. Rae, 48 U.S. (7 How.) 729 (1849).....15

Davis v. Passman, 442 U.S. 228 (1979).....15

Evans v. Nat'l Bank of Savannah, 251 U.S. 108 (1919).....12

TABLE OF AUTHORITIES – Continued

Page

Farmers' & Mechanics' Nat'l Bank v. Dearing, 91 U.S. 29 (1875).....9, 11, 24

Federated Dep't Stores v. Moitie, 452 U.S. 394 (1981).....17

Fortenberry v. Southtrust Bank of Ala., N.A., 1996 U.S. Dist. LEXIS 21685 (N.D. Ala. Mar. 21, 1996).....24

Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983).....13, 18, 19

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Grand Trunk Western Ry. Co. v. Lindsay, 233 U.S. 42 (1914).....15

Heaton v. Monogram Creditcard Bank of Ga., 297 F.3d 416 (5th Cir. 2002).....28, 29

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Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947).....16

Lapides v. Board of Regents, 122 S. Ct. 1640 (2002).....14, 20

M. Nahas & Co. v. First Nat'l Bank of Hot Springs, 739 F. Supp. 1338 (W.D. Ark. 1990), *aff'd*, 930 F.2d 608 (8th Cir. 1991).....24

Marquette Nat'l Bank of Minn. v. First of Omaha Serv. Corp., 439 U.S. 299 (1978).....10, 11

TABLE OF AUTHORITIES – Continued

Page

Matheis v. May Dep't Stores Co., 1999 U.S. Dist. LEXIS 21917 (E.D. Mo. May 21, 1999), *rev'd*, 218 F.3d 919 (8th Cir. 2000) 24

Mazaika v. Bank One, Columbus, N.A., 653 A.2d 640 (Pa. Super. Ct. 1994), *rev'd*, 680 A.2d 845 (Pa. 1996) 25

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 7

Mercantile Nat'l Bank v. New York, 121 U.S. 138 (1887) 7

Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804 (1986) 20, 29

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) 19

Moss v. SouthTrust Mobile Servs., Inc., 1995 U.S. Dist. LEXIS 21770 (N.D. Ala. Sept. 22, 1995) 24

National State Bank v. Long, 630 F.2d 981 (3d Cir. 1980) 8

Nelson v. Citibank (South Dakota), N.A., 794 F. Supp. 312 (D. Minn. 1992) 24

Partin v. Cableview, Inc., 948 F. Supp. 1046 (S.D. Ala. 1996) 24

Rivet v. Regions Bank of La., 522 U.S. 470 (1998) 15, 17

Sherman v. Citibank, N.A., 679 A.2d 652 (N.J. 1996) 13

Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996) 3, 9, 10, 24, 28

Tarble's Case, 80 U.S. (13 Wall.) 397 (1871) 29

TABLE OF AUTHORITIES – Continued

Page

The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913) 17

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United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) 21, 23

Watson v. First Union Nat'l Bank of S.C., 837 F. Supp. 146 (D.S.C. 1993) 24

STATUTES, REGULATIONS, AND RULES:

National Bank Act, 12 U.S.C. §§ 1 *et seq.*

§ 26 8

§ 27 8

§ 36(f)(1)(B) 8

§ 84 8

§ 85 ..... *passim*

§ 86 ..... *passim*

§ 93 8

§ 93(b) 21, 23

§ 161 ..... 8, 21

§ 164 8

§ 481 ..... 8, 21

§ 484 ..... 8, 22

12 U.S.C. § 1818 8

12 U.S.C. § 1818(b) 21

TABLE OF AUTHORITIES – Continued

Page

12 U.S.C. § 1820(d) 8, 21
12 U.S.C. § 1831d(a) 28
12 U.S.C. § 1831o 8
12 U.S.C. § 1831p-1 8
12 U.S.C. § 3907 8
28 U.S.C. § 1331 ..... *passim*
28 U.S.C. § 1332 16
28 U.S.C. § 1367(a) 13
28 U.S.C. § 1367(c)(3) 14
28 U.S.C. § 1441 ..... 3, 6, 12
28 U.S.C. § 1441(a) 12
28 U.S.C. § 1447(d) 20
Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq* 19
Labor Management Relations Act of 1947, § 301, 29 U.S.C. § 185 18
National Bank Act, ch. 106, 13 Stat. 99 (1864) 7
12 C.F.R.:
pt. 3 9
§ 4.37(c) 22
§ 7.4001(a) 9
pt. 25 9
pt. 30 9

TABLE OF AUTHORITIES – Continued

Page

pt. 32.1 9
pt. 34 9
68 Fed. Reg. 6363, 6366-6370 (Feb. 7, 2003) 8, 22
Sup. Ct. Rule 37.3(a) 1

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Consumer Compliance Examination: Overview (Aug. 1996) 23
Liquidity and Funds Management: Interest Rate Risk (June 1997) 22
Other Areas of Examination Interest: Litigation and Other Legal Matters (Feb. 2000) 26

TABLE OF AUTHORITIES – Continued

Page

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The Federalist 27

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INTEREST OF *AMICI CURIAE*[1]

Amici American Bankers Association, America's Community Bankers, Consumer Bankers Association, and Financial Services Roundtable are national trade associations whose members include national banks chartered by the United States Department of the Treasury, Office of the Comptroller of the Currency (OCC), as well as other types of financial institutions that are closely regulated by federal law.

The American Bankers Association is the largest national trade association of the banking industry in the United States, representing approximately 90 percent of the domestic assets of all American banks. America's Community Bankers is an independent national trade association that represents the nation's nearly 1,200 community banks of all charter types. The Consumer Bankers Association represents more than 750 federally insured banks and other financial institutions that collectively hold nearly 80 percent of all consumer deposits and about 70 percent of all consumer credit held by federally-insured depository institutions. The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to American consumers.

National banks, including those that are members of the *amici* associations, participate in a highly regulated industry. The OCC provides extensive oversight of

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[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of this Court along with this brief, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

national banks, including decisions about how many loans to grant, to whom, and at what interest rates. It is not uncommon for *amici*'s members to be the targets of state law litigation involving interest rates on loans, despite this Court's consistent holdings, stretching back 125 years, that the rate of interest that national banks charge can be challenged only through the express federal cause of action found in the National Bank Act, 12 U.S.C. § 86. Such litigation, although baseless, often costs national banks substantial sums of money, money that must be diverted from the funds available to ensure the financial soundness of the bank. Given the burden of such litigation on the safe and sound operation of national banks, *amici* have a strong interest in the proper resolution of the question presented in this case.

SUMMARY OF ARGUMENT

Usury claims against national banks arise under the National Bank Act because that statute establishes a federal interest rate that preempts state interest rates as applied to national banks and creates an exclusive federal cause of action to redress violations of that rate. Respondents' apparent attempt to avoid that federal cause of action by purportedly pressing only a plainly preempted state law claim must be rejected. Interest-bearing loans typically constitute the predominant assets on a national bank's balance sheet and are a primary component of virtually every national bank's income. Consequently, lawsuits under state law usury causes of action in state court that challenge the interest rate paid to a national bank can be a significant impediment to the proper functioning of the national bank.

A. In 1864, Congress created an exclusive and comprehensive federal regulatory regime in the National Bank Act to govern the financial practices of national banks, including the rate of interest charged for loans, and

vested regulatory enforcement authority in the United States Department of Treasury, Office of the Comptroller of the Currency (OCC). The federal government's exclusive regulation of national banks was, in part, a response to certain States' hostility to them. That regulation extends to the rate of interest a national bank may charge. As a matter of federal law, *see* 12 U.S.C. § 85, national banks are authorized to charge interest at the highest of three possible rates. Depending on the location of the national bank, it may be that none of those rates is a rate authorized by the law of the State where the borrower is located. Thus, as this Court has recognized, there is "no doubt" that Section 85 preempts state law usury limitations as applied to national banks. *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996).

But Congress did more than just create a federal right for a national bank to charge interest up to a federally-prescribed ceiling. Congress also created an express private cause of action against national banks in 12 U.S.C. § 86 for violations of Section 85. This Court has recognized repeatedly that Congress intended the Section 86 cause of action to be the exclusive means of private redress. Respondents' state court challenge to the rate of interest paid to a national bank necessarily arises under that federal cause of action created by the National Bank Act, which preempted and replaced state law usury claims against national banks. The claim thus is one "arising under" the federal cause of action established in Section 86 and, therefore, the action is within the original "arising under" jurisdiction of federal district courts, 28 U.S.C. § 1331, and is removable to federal court under 28 U.S.C. § 1441.

B. That respondents cite only state law in their complaint does not deprive the allegations of the complaint of their federal character. In determining its jurisdiction, a federal court is not bound by the complaint's legal averments but, instead, must look behind the face of the pleadings. That is the settled rule in diversity cases,

where federal courts must exercise jurisdiction over cases in disregard of the face of the complaint when an assessment of the true nature of the case shows that complete diversity exists. The power and obligation of the federal courts to look beyond the pleadings is no different when determining whether a federal court has jurisdiction over a case on the basis that a claim alleged "arises under" federal law.

Plaintiffs are free to choose between a state and a federal cause of action when both exist. But when a plaintiff's state law cause of action and remedy are preempted by federal law and Congress has created an exclusive federal cause of action in their stead, a plaintiff has no choice but to invoke the federal cause of action if he wishes to challenge the underlying conduct. In such circumstances, a complaint nominally alleging violations of the displaced state cause of action can be viewed only as a claim arising under the remaining federal cause of action. *See Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968). Although sometimes described as a doctrine of "complete preemption," the circumstances under which a district court may treat a purportedly state law claim as arising under federal law are not predicated upon the substantive breadth of the statute's preemption. The critical question is whether Congress created a federal cause of action to replace any state cause of action, thereby transforming a state cause of action into one "arising under" federal law. Because Section 86 of the National Bank Act does precisely that by creating an exclusive federal cause of action for persons who allegedly paid a national bank an interest rate greater than that allowed by Section 85, claims challenging the rate of interest paid to a national bank necessarily arise under federal law.

C. The nature of the federal interests at stake in adjudicating usury claims against national banks also weighs heavily in favor of federal jurisdiction. The OCC engages in frequent and extensive examinations of every

national bank to ensure compliance with federal law, including the federal limit on interest rates, and requires corrective actions whenever violations are found. These OCC examinations, performed as a component of the OCC's exclusive regulatory and supervisory authority and backed by the threat of significant civil penalties, substantially reduce the risk of national banks engaging in any systemic violations of Section 85 and promote a uniform interpretation of federal law.

Despite the fact that it has been settled for 125 years that state law causes of action challenging the interest paid to a national bank are preempted, such suits in state court are not uncommon. The failure of a court promptly to dismiss such a suit as preempted increases the risk of uncertainty and the cost of the suit, which are both harms that are particularly injurious to national banks intent on limiting financial and reputational risks. It is the experience of *amici* and their member institutions that such a prompt dismissal is less likely to occur in state trial courts. The efforts of the plaintiffs' bar to keep such cases in state court through a variety of not-so-subtle pleading stratagems suggests that they share the understanding that federal courts are more likely to analyze preemption questions correctly more often, and thus dismiss plaintiffs' claims before the costs and burdens of litigation enable a plaintiff to extract a settlement from a national bank. Although erroneous state trial court decisions on preemption can be appealed, such appeals are generally available only after the costs of discovery and litigation have been expended.

Litigation in state courts involving the interest rates paid to national banks is more likely than federal court litigation to lead to a lack of uniformity concerning the requirements of the National Bank Act and the propriety of determinations by the OCC, to the detriment of the national banking system. Although this Court ultimately

remains available to resolve any conflicts between the state and federal courts, the uncertainty of such a discretionary avenue of relief at the end of the litigation defeats Congress's intent to preempt entirely state causes of action challenging interest rates of national banks in favor of a singular federal remedy.

ARGUMENT

A COMPLAINT ALLEGING THAT THE RATE OF INTEREST PAID TO A NATIONAL BANK IS UNLAWFUL NECESSARILY "ARISES UNDER" FEDERAL LAW BECAUSE CONGRESS CREATED AN EXCLUSIVE FEDERAL CAUSE OF ACTION FOR SUCH CLAIMS AS PART OF A BROADER SCHEME TO PROMOTE AND PROTECT THE FINANCIAL SOUNDNESS OF NATIONAL BANKS

Although sometimes described as a doctrine of "complete preemption," the circumstances under which a district court must treat a purportedly state law claim as a claim "arising under" federal law, and therefore within the district court's original jurisdiction, 28 U.S.C. § 1331, is not predicated upon the breadth of a federal statute's preemption. Instead, the critical question is whether Congress has created a federal cause of action to take the place of the purportedly state law cause of action. When Congress has done so, a complaint that invokes the displaced state cause of action necessarily arises under the exclusive federal cause of action and can be removed to federal court by a defendant sued in state court, 28 U.S.C. § 1441. Congress has done just that in Section 30 of the National Bank Act, 12 U.S.C. §§ 85, 86.

Congress intended for usury claims against national banks to arise under the National Bank Act because of the potential adverse effect on the national banking system that could result if suits challenging a critical component of a national bank's operations – its granting of interest-bearing loans – were left in the hands of state courts at the sole discretion of plaintiffs. National banks such as *amici's* members are subject to comprehensive federal regulatory supervision of their interest rates and loan practices. The federal interest in the safety and soundness of such institutions that led to such supervision confirms that Congress intended that challenges to such rates arise under federal law.

A. A Complaint That Challenges The Rate Of Interest Paid To A National Bank "Arises Under" The National Bank Act And Is Removable To Federal Court

In 1864, in the midst of the Civil War, Congress enacted the National Bank Act, ch. 106, 13 Stat. 99 (1864). The Act authorized the creation of national banks "for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government." *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1874); *see also Mercantile Nat'l Bank v. New York*, 121 U.S. 138, 154 (1887) ("The object of the [Act] was to establish a system of national banking institutions, in order to provide a uniform and secure currency for the people, and to facilitate the operations of the Treasury of the United States.").

Congress expected States and their regulators to be hostile to national banks. *See, e.g.*, Cong. Globe, 38th Cong., 1st Sess. 1393 (1864) (Rep. Washburn) ("it will not do to place [the national banking system] in the power of the States, otherwise you place it in the power of any State which may be opposed to the system to cripple and destroy it"). That expectation was rooted in the attempts by some States to disrupt the operations of previously established national banks. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (discriminatory stamp tax targeted at national bank); 1 Charles Warren, *The Supreme Court*

in United States History 505 (rev. ed. 1926) (giving examples of state laws outlawing national bank). Congress therefore created a comprehensive federal regulatory regime to promote the national banking system and excluded state laws and regulators.

1. Congress provided in the National Bank Act that the rate of interest charged for loans by national banks shall be governed only by federal law

From the outset, Congress vested complete regulatory authority over national banks in the United States Department of the Treasury, Office of the Comptroller of the Currency (OCC). Congress has granted the OCC the exclusive power to authorize the creation of new national banks, *see* 12 U.S.C. §§ 26-27, to establish substantive standards to ensure financial safety and soundness, *see* 12 U.S.C. §§ 84, 1831o, 1831p-1, 3907, to require regular reports from the national banks, *see* 12 U.S.C. § 161, and to redress and punish any violations of the law, or the OCC's regulations or orders, *see* 12 U.S.C. §§ 93, 164, 1818. Congress also required federal regulators and supervisors to engage in regular examinations of national banks for compliance with all banking laws, *see* 12 U.S.C. §§ 481, 1820(d), and provided them substantially exclusive visitorial authority, *see* 12 U.S.C. § 484; 68 Fed. Reg. 6363, 6366-6370 (Feb. 7, 2003). That scheme of exclusively federal regulation was designed to protect national banks from "the hazard of unfriendly legislation by the States." *Tiffany*, 85 U.S. (18 Wall.) at 413. Indeed, even when the substance of a state law is not preempted, the OCC is the only regulatory agency that may enforce the state law against national banks. *See, e.g.*, 12 U.S.C. § 36(f)(1)(B) ("The provisions of any State law to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the Comptroller of the Currency."); *National State Bank v. Long*, 630 F.2d 981, 989 (3d Cir. 1980) ("[E]nforcement of the state statute is the responsibility of the Comptroller of the Currency rather than the State Commissioner."). Of course, not every state law that incidentally applies to national banks is preempted by federal law, *see Atherton v. FDIC*, 519 U.S. 213, 222-223 (1997), but Congress clearly delegated the authority to govern the financial workings of national banks solely to federal regulators.

Interest-bearing loans typically constitute the predominant assets on a national bank's balance sheet and are a primary component of virtually every national bank's income. The OCC extensively regulates most aspects of a national bank's program to loan money, including the amount of money the national bank may lend and the appropriate combination of loans it can make at different rates of interest to account for risk. *See, e.g.*, 12 C.F.R. pts. 3, 25, 30, 32.1, 34. Since the inception of the national banking system, federal law has governed the rate of interest a national bank may charge as part of the federal regulatory scheme. *See Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 34 (1875). In doing so, Congress intended that interest include the full range of payments "compensating a creditor or prospective creditor for an extension of credit, making available a line of credit, or any default or breach by a borrower of a condition upon which credit was extended," such as "late fees, not sufficient funds (NSF) fees, over-limit fees, annual fees, cash advance fees, and membership fees." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740, 747 (1996) (upholding OCC's regulation, 12 C.F.R. § 7.4001(a), as a reasonable interpretation of the statute). Under 12 U.S.C. § 85, national banks are authorized to charge interest at the greatest of three rates: (1) the rate that state banks are allowed to charge in the State where the national bank is located; (2) under the "most favored lender" doctrine, the rate that any other lender is allowed to charge in the State where the national bank is located; or (3) "a rate of 1 per

centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank" in the district where the national bank is located. *See Marquette Nat'l Bank of Minn. v. First of Omaha Serv. Corp.*, 439 U.S. 299, 308 n.19, 309-311, 318 n.31 (1978).[2]

There is "no doubt" that Section 85 preempts state law usury limits as applied to national banks. *Smiley*, 517 U.S. at 744; *see also Marquette*, 439 U.S. at 308 ("The interest rate that [a national bank] may charge *** is *** governed by federal law."). In all instances, state usury limits are preempted; the rates set by a State's law are only relevant to the extent they are incorporated by the National Bank Act. Indeed, in certain circumstances, national banks may legally charge interest rates higher than those allowed to other lenders under state law. For

[2] Section 85 provides in relevant part:

> Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run.

example, if the rate based on the Federal Reserve's discount rate is higher than the state rate, national banks may charge the higher rate. Also, because national banks serve customers across state lines, a national bank located in one State is authorized to charge residents of another State the interest rate allowed in the State where the bank is located, even if that rate is higher than the rate permitted under the laws of the customer's State. *See Marquette*, 439 U.S. at 317-318.

2. Congress created a federal cause of action in the National Bank Act for individuals who have paid interest rates that are in excess of those allowed under federal law, and intended that it be an exclusive remedy

Congress did more than just create a federal right for a national bank to charge interest up to a federally-prescribed ceiling. Congress also created an express private cause of action for violations of Section 85 by national banks. Congress provided that a person who has paid an interest rate greater than that allowed by Section 85 "may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association." 12 U.S.C. § 86. In doing so, Congress also established a federal limit on the scope of relief available against a national bank for violation of Section 85. Moreover, Congress specified that that federal cause of action is governed by a two-year statute of limitations. *Ibid.*

This Court has recognized repeatedly that Congress intended that the Section 86 cause of action be the exclusive means of private redress against a national bank that violates the interest rate limits set forth in Section 85. *See Farmers' & Mechanics' Nat'l Bank*, 91 U.S. at 35 ("the

power to supplement [Sections 85 and 86] by State legislation is conferred neither expressly nor by implication" and "would be unreason[able], and contrary to the manifest intent of Congress"); *Barnet v. National Bank*, 98 U.S. 555, 559 (1878) ("The statute which gives the right prescribes the redress, and both provisions are alike obligatory upon the parties."); *Evans v. Nat'l Bank of Savannah*, 251 U.S. 108, 109 (1919) ("whether transactions by [a national bank] are usurious, and the consequent penalties therefor, must be ascertained upon a consideration of the National Bank Act"). Thus, by creating the exclusive cause of action in Section 86, Congress displaced state law usury claims against national banks with a uniform federal remedy.

3. Respondents' complaint "arises under" the National Bank Act and was properly removed to federal court

A defendant seeking to remove a case from state to federal court need not establish specific congressional intent that a particular federal cause of action be removable, contrary to respondents' suggestion. Br. in Opp. 9. Instead, Congress granted defendants a general right to remove an action to federal court under Section 1441 of Title 28, which specifies that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). Because Congress has granted the district courts "original jurisdiction" over all civil actions "arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, Congress has evidenced all the intent that is necessary that a state court civil action may be removed to federal court if the action arises under federal law.

As a general rule, a "suit arises under the law that creates the cause of action." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8-9 (1983) (*quoting American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)). In the instant case, the National Bank Act creates the cause of action for the underlying conduct alleged in respondents' complaint. That complaint alleges that petitioner Beneficial National Bank, a national bank, and its corporate affiliate charged "excessive interest" on loans made to respondents in violation of Alabama statutory and common law limits on interest, and that respondents "have been injured and damaged" by petitioners' actions. Comp. ¶¶ 59-60. Respondents' allegation that petitioners violated Alabama's authorized interest rate necessarily alleges a violation of federal law – Section 85 – which makes interest charges in excess of state law illegal, at least to the extent that the State in question is the location of the national bank (a fact contested by petitioners, which maintain that they are located in Delaware) and the state law rate is not less than any of the alternative rates authorized in Section 85.[3] That challenge to the rate of interest paid to a national bank necessarily arises under the federal cause of action created by the National Bank Act – Section 86 – that preempts

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[3] Respondents' complaint includes other counts that are based on related allegations concerning the rate of interest charged by petitioners. Comp. ¶¶ 38-57, 63-68. Those claims would also fall within the preemptive scope of the National Bank Act, *cf. Sherman v. Citibank, N.A.*, 679 A.2d 652 (N.J. 1996), *reinstating* 640 A.2d 325 (N.J. Super. Ct. App. Div. 1994) (holding that state cause of action for failing to disclose that state law prohibited late fee charges was preempted by Section 85), but the Court need not address those other counts. If the district court had original jurisdiction over the usury count, then the court could exercise supplemental jurisdiction over all other claims and parties arising from the same case or controversy. *See* 28 U.S.C. § 1367(a).

and replaces state law usury claims against national banks.

Indeed, it is clear that such a claim "arises under" federal law within the federal district court's original jurisdiction because, if respondents' complaint had originally been filed in federal court, it could not have been dismissed for lack of "arising under" jurisdiction.[4] Therefore, removal of the civil action to federal court at petitioners' request was proper.[5]

B. A Complaint Necessarily "Arises Under" Federal Law Even If It Expressly Invokes Only A State Cause Of Action And Fails To Cite The Exclusive Federal Cause Of Action That Was Enacted In Its Stead

Respondents did not cite the National Bank Act as the basis for their usury claim against the national bank, but that omission on respondents' part does not negate federal

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[4] An action can "arise under" Section 1331 even if the allegations of the complaint do not state a claim upon which relief can be granted under federal law, so long as the claim is not wholly insubstantial and frivolous. *See Bell v. Hood*, 327 U.S. 678, 681-682 (1946). If respondents' claims under Section 86 are subsequently dismissed, either because they did not allege a violation of Section 85 or later proceedings show that petitioners in fact did not violate Section 85, the district court would then have discretion to retain or remand whatever state law claims remained, if any. *See* 28 U.S.C. § 1367(c)(3); *Lapides v. Board of Regents*, 122 S. Ct. 1640, 1643 (2002) ("the law commits the remand question, ordinarily a matter of discretion, to the Federal District Court for decision in the first instance").

[5] If a defendant does not exercise its right to remove the civil action to federal court, the case can proceed in state court. For although it is clear that Congress intended challenges to the interest rates paid to national banks to be brought exclusively under federal law, Congress did not evidence an intent to create exclusive federal court jurisdiction.

jurisdiction. *See Grand Trunk Western Ry. Co. v. Lindsay*, 233 U.S. 42, 48 (1914) (rejecting the argument that a federal statute "may not be applied to a situation which is within its provisions unless, in express terms, the provisions of the act be formally invoked" in the complaint as "manifest[ly] unsound[ ]"). By adopting the Federal Rules of Civil Procedure, the Court expressly declined to adopt common law or "code" pleading rules that require a complaint to allege a "cause of action" or a "theory of the pleadings." *See Davis v. Passman*, 442 U.S. 228, 237 (1979); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1219, at 188-194 (2d ed. 1990); *see also Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1078 (7th Cir. 1992) (Easterbrook, J.) ("Instead of asking whether the complaint points to the appropriate statute, a court should ask whether relief is possible under any set of facts that could be established consistent with the allegations.").

Moreover, the fact that respondents cited only Alabama state law (Comp. ¶¶ 36, 60) and expressly disclaimed any federal cause of action (Comp. ¶ 31), cannot deprive the allegations of the complaint of their federal character. A federal court is not bound by the complaint's legal averments in determining its jurisdiction. Just as a federal court cannot exercise subject-matter jurisdiction by consent or stipulation, *see Cutler v. Rae*, 48 U.S. (7 How.) 729, 731 (1849), neither can a federal court be deprived of jurisdiction based on "artful" pleadings, *i.e.*, pleadings that are drafted in a manner to avoid an exclusive federal cause of action. *See Rivet v. Regions Bank of La.*, 522 U.S. 470, 475-476 (1998) (collecting cases). Federal courts have the obligation to look behind the face of the pleadings when determining jurisdiction.

1. Federal courts are not bound by the face of the pleadings in determining federal jurisdiction

Federal courts often are presented with jurisdictional questions that require them to look beyond the manner in which a complaint characterizes an issue or a party. For example, in order to exercise diversity jurisdiction under 28 U.S.C. § 1332, a federal court must determine that there is "complete diversity" between each plaintiff and all the defendants. In making that determination, a federal court may disregard the plaintiff's designation in the caption and text of the complaint of which parties are defendants or plaintiffs and, as a matter of federal law, "realign the parties for jurisdictional purposes according to their real interests." *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 523 (1947). "Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants." *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 69 (1941). It is the duty of the federal courts "to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.'" *Ibid.* Similarly, a federal court can exercise diversity jurisdiction over a civil action even if one of the defendants named in the complaint shares the same citizenship as the plaintiff, so long as the federal court finds that no colorable claim for relief is available against that particular defendant under state law and all the remaining defendants are diverse from the plaintiff. *See Chicago, Rock Island & Pacific Ry. Co. v. Schwyhart*, 227 U.S. 184, 193-194 (1913); 14 Wright & Miller, *supra*, § 3641, at 173-175. Thus, a non-colorable state law claim alleged in a complaint must be disregarded in determining whether the federal court has jurisdiction over the complaint.

The power of the federal courts to look beyond the pleadings is no different when determining whether a federal court has jurisdiction over a case on the basis that

the claim alleged arises under federal law. This Court explained in *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981), that it was a "settled principle" that a district court assessing whether a complaint can be removed from state to federal court must "'seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization.'" *Id. at* 397 n.2; *see id.* at 408 (Brennan, J., dissenting) ("The federal court must therefore scrutinize the complaint in the removed case to determine whether the action, though ostensibly grounded solely on state law, is actually grounded on a claim in which federal law is the exclusive authority."). Although the Court later confined the result reached in *Moitie* to its particular facts, *see Rivet*, 522 U.S. at 472, the Court at the same time reaffirmed the principle relevant to this case – "[i]f a court concludes that a plaintiff has 'artfully pleaded' claims * * *, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint." *Id.* at 475.

2. A complaint alleging a state law claim and seeking a state law remedy that has been displaced by a federal cause of action necessarily "arises under" federal law

Once Congress creates an exclusive federal cause of action to replace an existing state law cause of action, "any claim purportedly based on that pre-empted state-law claim is considered, from its inception, a federal claim, and therefore arises under federal law." *Rivet*, 522 U.S. at 476 (*quoting Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987)). Although plaintiffs are free to choose between a state and a federal cause of action when both exist and may be "masters" of their complaints by bringing their suit under only the state cause of action, *see The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913), that is not so when a plaintiff's state law claim is preempted by federal

law and Congress has created an exclusive federal cause of action in its stead. In such circumstances, a complaint alleging violations of the displaced state cause of action can be viewed only as a claim arising under the remaining federal cause of action.

For example, in *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968), an employer filed suit in state court seeking an injunction based on the allegation that a union had breached a collective bargaining agreement. Although the employer could have brought its suit under § 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185, which creates a federal cause of action for "violation[s] of contracts between an employer and a labor organization representing employees in an industry affecting commerce," the employer did not invoke that cause of action but alleged only a state breach of contract claim. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983) (describing complaint in *Avco*). This Court, nonetheless, sustained the removal of the claim to federal court because an action enforcing a collective bargaining agreement "is controlled by federal substantive law even though it is brought in a state court." *Avco*, 390 U.S. at 559. Because a claim to enforce a collective bargaining agreement could be brought only under the LMRA's cause of action, it was "clear" that the claim under the collective bargaining agreement was "one arising under the 'laws of the United States' within the meaning of the removal statute." *Ibid.*

That is not to suggest, as do respondents (Br. in Opp. 18), that the "artful pleading" doctrine applies only when a federal statute has a broad preemptive scope. Although sometimes described as a doctrine of "complete preemption," the circumstances under which a district court may treat a purportedly state law claim as arising under federal law are not predicated upon the substantive breadth of the statute's preemption. Indeed, as this Court's cases under

the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, make clear, the critical question is whether Congress provided the plaintiff with a federal cause of action against the defendant to replace the state cause of action. Thus, in *Franchise Tax Board*, the Court held that certain state law claims did not "arise under" federal law even though it "may well be" that ERISA preempted the challenged state conduct. The Court explained that the complaint did not "arise under" federal law because ERISA did "not provide anyone * * * with an express cause of action for a declaratory judgment on the issues in this case." 463 U.S. at 26. By contrast, in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), the Court held that when a plaintiff's common law contract and tort claims against his employer relating to an employee benefit plan were preempted by ERISA and ERISA also "provides an exclusive federal cause of action for resolution of such disputes," *id.* at 62, then the "suit, although it purports to raise only state law claims, is necessarily federal in character" and is "removable to federal court by the defendants," *id.* at 67.

Thus, this Court's cases establish that, where federal law provides the exclusive cause of action by preempting state causes of action and by creating a federal private right of action, a federal court must treat as federal a complaint purportedly raising only the displaced state cause of action. As discussed above, *see* pages 8-12, *supra*, the National Bank Act does precisely that by preempting all state causes of action for persons who allege they paid a national bank an interest rate greater than that allowed by Section 85, and by creating in Section 86 a federal cause of action for the claim.

C. Removal To Federal Court Of Complaints Challenging The Rate Of Interest Charged By National Banks Furthers The Comprehensive Regulatory Scheme Established By Congress Over National Banks By Promoting Uniformity And Reducing The Costs Of Litigation

As demonstrated above, the straightforward test established by this Court to determine "arising under" jurisdiction when a plaintiff attempts to rely on a state law claim rather than a federal cause of action is whether that federal law preempts the state cause of action and creates a private federal cause of action in its place. That test, met here, comports with the Court's insistence that "jurisdictional rules * * * be clear," so that judicial and litigation resources are not unnecessarily expended on procedural matters. *Lapides v. Board of Regents*, 122 S. Ct. 1640, 1645 (2002); *see also Burnham v. Superior Ct.*, 495 U.S. 604, 626 (1990) (plurality opinion of Scalia, J.). The need for such clarity is particularly important in the removal setting, where a district court's determination that removal is not proper is rarely subject to appellate review. *See* 28 U.S.C. § 1447(d).

The Court also has suggested that the question whether an action "arises under" federal law may include a consideration of "the *nature* of the federal interest at stake" in light of "the demands of reason and coherence, and the dictates of sound judicial policy," and "with an eye to practicality and necessity." *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 814 n.12, 810 (1986). Although *amici* believe that such a factor is not pertinent here because the statutory language of the National Bank Act is so clear, to the extent such considerations are relevant, the nature of the federal interest at stake in adjudicating usury claims against national banks in federal court weighs heavily in favor of federal jurisdiction.

1. The OCC engages in extensive examinations of each national bank to ensure compliance with federal law, including federal limits on interest rates, and requires corrective action whenever violations are found

There are more than 2,100 national banks throughout the country. Those institutions are responsible for more than 58 percent ($3.8 trillion) of the total assets of all banks in the United States. *See* Comptroller of Currency, *Performance and Accountability Report: Fiscal Year 2002*, at i (2002). Although each national bank is a private association with shareholders that is operated for profit, each national bank also is a federal instrumentality closely supervised and regulated by the OCC to ensure that the bank engages in safe and sound financial practices. *See* 12 U.S.C. §§ 93(b), 1818(b). That degree of regulation is, of course, of paramount importance to the Nation's economy, which relies on the financial safety and soundness of those institutions.

Perhaps the "most effective" tool for federal regulation of banking is "the broad visitorial power of federal bank examiners." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 329 (1963). Whenever the OCC deems it necessary, but in most cases at least once each year, *see* 12 U.S.C. § 1820(d), it may order "a thorough examination of all the affairs" of a national bank. 12 U.S.C. § 481. During Fiscal Year 2002, the OCC conducted more than 3,100 examinations of national banks. *See Performance and Accountability Report, supra*, at 9. In addition, national banks are required to furnish detailed periodic reports of their operations. *See* 12 U.S.C. § 161. "In this way the [federal regulatory] agencies maintain virtually a day-to-day surveillance of the American banking system." *Philadelphia Nat'l Bank*, 374 U.S. at 329. Indeed, for the largest national banks, the concept of day-to-day oversight is literally true, as the OCC has placed "full-time teams of resident examiners on site at the largest banks – as many

as 40 or 50 examiners at the very largest." Comptroller John D. Hawke, Remarks before the Risk Management Association's Capital Management Conference (June 6, 2002) (available at www.occ.treas.gov/ftp/release/2002-49.txt); *see also Performance and Accountability Report, supra*, at 10 (describing distribution of examiners based on bank size and assets). This system of federal supervision is exclusive. Except under very narrowly defined circumstances, state regulators may not examine the records of a national bank, *see* 12 U.S.C. § 484; 68 Fed. Reg. 6363, 6366-6370 (Feb. 7, 2003), and cannot review the OCC's examination reports except at the Comptroller's "sole discretion," 12 C.F.R. § 4.37(c).

Significantly for purposes of this case, the OCC's bank examiners monitor loans granted by national banks, including the interest charged on those loans, as part of their general safety and soundness examinations. *See generally* Comptroller of Currency, *Comptroller's Handbook: Assets: Loan Portfolio Management* (Apr. 1998); Comptroller of Currency, *Comptroller's Handbook: Liquidity and Funds Management: Interest Rate Risk* (June 1997).[6] In addition, as part of each national bank's consumer compliance review, the records of the national bank are examined "[t]o determine the bank's compliance with Interest on Loans" requirement by "review[ing] loan reports or a sample of loans (originated since the preceding examination) to determine that the rates charged comply with 12 USC 85." Comptroller of Currency, *Comptroller's Handbook: Consumer Compliance Examination: Other Consumer Protection Laws and Regulations* 3, 6 (Oct. 1996); *see also* Comptroller of Currency, *Comptroller's Handbook: Consumer Compliance Examination: Community Bank Consumer Compliance* 11, 44 (Nov. 2000) (similar).

[6] The *Comptroller's Handbook* is a series of publications issued by the OCC that "was developed primarily for national bank examiners to use in supervising banks, but has grown to serve other users as well. It educates readers about bank activities and provides a guide to how the OCC expects banks to conduct different activities." Comptroller of Currency, *Comptroller's Handbook: Bank Supervision and Examination Process: Introduction* 5 (July 1994).

When "violations of law or regulations are identified," national banks must take "corrective action." *Other Consumer Protection Laws, supra*, at 3, 7; *see also* Comptroller of Currency, *Comptroller's Handbook: Consumer Compliance Examination: Overview* 4, 15-16 (Aug. 1996). In addition, the OCC has the authority to impose civil penalties for each day during which a violation of Section 85 continues, ranging from $5,000 a day for an unintentional violation to $1,000,000 a day for knowingly committing such a violation for substantial pecuniary gain. *See* 12 U.S.C. § 93(b). The "frequent and intensive" examinations, *Philadelphia Nat'l Bank*, 374 U.S. at 330, performed by the OCC significantly reduce the risk of national banks engaging in any systemic violations of Section 85, while ensuring a uniform interpretation of federal law through a unified enforcement scheme.

2. Litigation in state courts involving the interest rates paid to national banks is likely to lead to a lack of uniformity concerning the requirements of the National Bank Act and the propriety of determinations by the OCC, thereby increasing the costs and uncertainty of litigation

a. Unfortunately, civil actions in state courts against national banks concerning the rates of interest paid, such as the one brought by respondents, are not uncommon occurrences. Such cases rarely generate reported opinions in state courts, however, because most state trial court opinions are unpublished and, for the reasons discussed below, most such cases are settled if they are not disposed

of early at the trial level.[7] Such suits are often brought purportedly under state causes of action to recover damages in excess of those available under the federal cause of action or to challenge conduct authorized by federal law, even though it has been clear for more than 125 years that such state causes of action are preempted as applied to national banks. *See Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 35 (1875); *Barnet v. National Bank*, 98 U.S. 555, 558 (1878); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996). Despite the baseless nature of the suits as a matter of federal law, the failure of a state court to dismiss immediately a case as preempted may compel a national bank, ever-conscious of the need to limit risk, to enter into settlements.

It is the experience of *amici* and their member institutions that a prompt dismissal on preemption grounds is unlikely to occur in state trial courts. *Amici* do not suggest that all state trial courts will incorrectly refuse to dismiss preempted claims and remedies, or that all federal district

[7] For examples of complaints filed in state courts against national banks concerning the rate of interest charged that were removed (even if only briefly) to federal court, *see, e.g.*, *Jones v. BankBoston, N.A.*, 115 F. Supp. 2d 1350 (S.D. Ala. 2000); *Matheis v. May Dep't Stores Co.*, 1999 U.S. Dist. LEXIS 21917 (E.D. Mo. May 21, 1999), *rev'd*, 218 F.3d 919 (8th Cir. 2000); *Partin v. Cableview, Inc.*, 948 F. Supp. 1046 (S.D. Ala. 1996); *Fortenberry v. Southtrust Bank of Ala., N.A.*, 1996 U.S. Dist. LEXIS 21685 (N.D. Ala. Mar. 21, 1996); *Hunter v. Rich's Dep't Stores*, 945 F. Supp. 1500 (N.D. Ala. 1995); *Moss v. SouthTrust Mobile Servs., Inc.*, 1995 U.S. Dist. LEXIS 21770 (N.D. Ala. Sept. 22, 1995); *Watson v. First Union Nat'l Bank of S.C.*, 837 F. Supp. 146 (D.S.C. 1993); *Goehl v. Mellon Bank*, 825 F. Supp. 1239 (E.D. Pa. 1993); *Copeland v. MBNA Am., N.A.*, 820 F. Supp. 537 (D. Colo. 1993); *Ament v. PNC Nat'l Bank*, 825 F. Supp. 1243 (W.D. Pa. 1992); *Nelson v. Citibank (South Dakota), N.A.*, 794 F. Supp. 312 (D. Minn. 1992); *M. Nahas & Co. v. First Nat'l Bank of Hot Springs*, 739 F. Supp. 1338 (W.D. Ark. 1990), *aff'd*, 930 F.2d 608 (8th Cir. 1991); *Beeman v. MBank Houston, N.A.*, 691 F. Supp. 1027 (S.D. Tex. 1988).

courts will always resolve preemption questions correctly. *Amici's* experience, however, has been that federal courts are more likely to analyze preemption questions correctly more often, an experience that may be explained by the differing structural incentives faced by state courts. *See* Karen A. Jordan, *The Complete Preemption Dilemma*, 31 Wake Forest L. Rev. 927, 990 (1996) ("state courts may be less inclined to give full effect to a federal preemption provision" because "a federal preemption provision may harm state citizens by eradicating a state right to a remedy"); *cf. Mazaika v. Bank One, Columbus, N.A.*, 653 A.2d 640, 642 n.3 (Pa. Super. Ct. 1994) (finding no preemption of usury claim against national bank and likening the interest rate charged by a national bank in compliance with the National Bank Act to the conduct of Don Corleone, a fictional organized-crime figure and loan shark), *rev'd*, 680 A.2d 845 (Pa. 1996).

Whatever the reasons, *amici's* perception that state courts are more amenable to plaintiffs' claims against national banks also appears to be shared by the plaintiffs' bar. Many suits against national banks are initially brought in state court and are carefully drafted, as was the complaint in this case, with the apparent goal of preventing removal to federal court based on diversity jurisdiction by limiting the amount in controversy just below $75,000. Comp. ¶ 62 (demanding damages "not to exceed $74,900 per named Plaintiff"); Br. in Opp. App. 11a (same demand in different lawsuit against national bank).

In addition, cases removed from state to federal court on the basis of federal question jurisdiction (excluding prisoner suits) are dismissed before trial 72% of the time, compared with a 31% dismissal rate for federal question suits originally filed in federal court. *See* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System: Win Rates and Removal Jurisdiction*, 83 Cornell L. Rev. 581, 594 tbl.

1 (1988) (describing data and suggesting various explanations). That substantial disparity suggests that cases with weaker federal claims are originally brought in state court, perhaps in the belief that state courts are less likely to dismiss a plaintiff's claims, which in turn increases the possibility of extracting a settlement from the defendant.

b. The mere existence of a state court decision refusing to find preempted state substantive laws and remedies concerning the rate of interest paid to national banks can create uncertainty and thus add to various forms of risk that are the subject of federal regulation and frequent federal examination. The OCC has concluded that, even if a national bank ultimately prevails in litigation of a claim, the mere act of litigating the claim "can disrupt the operations of a bank, possibly reducing the institution's earnings and capital," by causing "foregone business opportunities, loss of corporate focus, or diminished reputation in the community." Comptroller of Currency, *Comptroller's Handbook: Other Areas of Examination Interest: Litigation and Other Legal Matters* 1 (Feb. 2000). Additionally, according to the OCC, "depositor confidence in an institution may be shaken by litigation against the bank, and may lead to unanticipated loss of both deposits and capital." *Id.* at 3. Because "[r]eal or threatened litigation can pose significant costs to banking organizations," the OCC requires its examiners "to identify any pending or threatened litigation involving the bank, assess the liabilities and any impact from those legal matters, and determine whether the bank is effectively identifying, measuring, monitoring, and controlling those risks." *Id.* at 1. Considering the "likelihood of an unfavorable outcome," the "estimated cost of defending the claim," and "an estimate of the amount or range of potential loss," the examiner must "[d]etermine whether threatened or pending litigation [or] claims * * * against the bank exist and quantify their potential effect on capital, earnings, and financial soundness." *Id.* at 11, 12, 13.

Permitting a national bank to remove to federal court a case concerning the rate of interest it charged reduces the likelihood of error, confusion, and delay and thus reduces the potential effect of such a case on the financial soundness of an institution in an exclusively federally-regulated industry. *See* American Law Inst., *Study of the Division of Jurisdiction Between State and Federal Courts* 4 (1969) ("Federal question jurisdiction is necessary to preserve uniformity in federal law and to protect litigants relying on federal law from the danger that state courts will not properly apply that law, either through misunderstanding or lack of sympathy."); *The Federalist* No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.").

Although erroneous state trial court decisions on preemption can be appealed, such appeals are generally available only after the costs of discovery and litigation have been expended and a final judgment has been entered. National banks are thereby denied one of the primary benefits of preemption – a quick dismissal of preempted state law claims as a matter of law. And although this Court ultimately remains available to resolve any conflicts between the state and federal courts, the uncertainty of such a discretionary avenue of relief at the end of the litigation defeats Congress's intent to preempt state causes of action challenging interest rates of national banks in favor of a singular federal remedy. *See* Arthur R. Miller, *Artful Pleading: A Doctrine in Search of a Definition*, 76 Tex. L. Rev. 1781, 1821-1822 (1998) ("One of the purposes of complete preemption is to vindicate Congress's purported desire not to allow any causes of action in a particular substantive area other than federal causes of

action. Assuming that this intent can be found, it is not enough to respond *** that the Supreme Court can vindicate the underlying statutory purpose through appellate jurisdiction because this will not satisfy the congressional desire to abrogate state causes of action."). Nor does it create the level of certainty necessary for the optimal functioning of a national banking system.

c. In addition, national banks, subject to the pervasive federal oversight of the OCC, have a particular interest in not having state courts second-guess federal agency determinations regarding issues that may affect the national banks' financial safety and soundness. Because the OCC is charged with exclusive governmental enforcement of Section 85, its determination about the scope and meaning of the statute is accorded great deference. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739-741 (1996). Allowing suits in state court to proceed against a national bank on necessarily federal claims over the objection of the national bank could interfere with the OCC's exclusive regulatory jurisdiction by permitting, in essence, collateral attacks on the OCC's determinations.

A case currently pending in Louisiana state court reveals the problems that can result when a state court sits to review bank conduct that is sanctioned by a federal regulatory body. In *Heaton v. Monogram Creditcard Bank of Georgia*, No. 98-8275 (La. Civ. Dist. Ct., Orleans Parish), the plaintiffs brought a class action suit against a defendant alleging violations of state usury laws. *See Heaton v. Monogram Creditcard Bank of Ga.*, 297 F.3d 416, 419 (5th Cir. 2002) (describing litigation). The Federal Deposit Insurance Corporation (FDIC) had previously certified that the defendant was a "bank" for purposes of the Federal Deposit Insurance Act, which determination, *inter alia*, entitled it to deposit insurance, subjected it to federal regulation, and preempted certain state usury laws, 12 U.S.C. § 1831d(a). *See* 297 F.3d at 424. The state court refused to accept the FDIC's certification and held

that whether the defendant was a "bank" entitled to the federal preemption defense was a factual question to be determined by a jury. *Heaton v. Monogram Creditcard Bank of Ga.*, No. 98-8275, Judgment at 3-4 (La. Civ. Dist. Ct., Orleans Parish July 9, 2001). The state court also refused to allow the FDIC to intervene in the litigation to defend its actions. *See Heaton*, 297 F.3d at 423 n.10. On removal by the defendant, the federal district court remanded for lack of jurisdiction, but on appeal, the order was reversed after the intervention of the FDIC in the litigation. *See id.* at 420. (The case is still pending in state court because the federal court of appeals' mandate has not issued due to a pending petition for rehearing). That litigation has been pending for five years, incurring substantial and unnecessary fees and costs, because of the failure of the state court promptly and properly to resolve the question of federal preemption.

While certainly an unusual case procedurally, similar difficulties would arise were a state court to conclude that a practice that was approved by the OCC during the course of its examination of a national bank nonetheless violated the National Bank Act as interpreted by a state court. To maintain the proper roles of federal and state courts, national banks should be permitted to invoke federal court jurisdiction so that inquiry into the soundness of the OCC's judgment can be made, if at all, by federal trial and appellate courts. *Cf. Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871).

From their inception, "National banks have been National favorites." *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 411 (1874). In furtherance of its policies of competitive and financially sound national banking system, Congress preempted state law usury causes of action against national banks and replaced them with a single federal cause of action. The "practicality and necessity," *Merrell Dow Pharm.*, 478 U.S. at 810, of a federal forum to vindicate those national policies complements the

legal analysis that demonstrates that civil actions challenging the rate of interest paid to a national bank necessarily "arise under" federal law.

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted.

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In The
Supreme Court of the United States

BENEFICIAL NATIONAL BANK, ET AL.,

Petitioners,

v.

MARIE ANDERSON, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF ARIZONA, ALASKA, CONNECTICUT, GEORGIA, HAWAII, ILLINOIS, IOWA, MARYLAND, MINNESOTA, MISSOURI, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, OHIO, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
THE DOCTRINE OF COMPLETE PREEMPTION DOES NOT APPLY TO A STATE-LAW CLAIM WHICH A NATIONAL BANK ASSERTS IS PREEMPTED BY THE USURY PROVISIONS OF THE NATIONAL BANK ACT	4
A. State-Law Claims Are Generally Not Removable to Federal Court Merely Because the Defense of Preemption Is Asserted	4
B. The Well-Pleaded Complaint Rule Only Permits Removal of a State-Law Claim When Congress Specifically Intended That Type of Claim to be Transformed, by Operation of Law, into a Federal Claim	6
1. Congressional intent to create an exclusive federal cause of action does not, by itself, establish congressional intent to convert a state-law claim into a federal claim by operation of law	8
2. This Court's decisions confirm that the complete preemption doctrine applies only when Congress specifically intended to convert state-law claims into federal claims by operation of law	11

TABLE OF CONTENTS – Continued

Page

C. There Is No Basis Upon Which to Conclude That Congress, Through the National Bank Act, Intended to Convert State-Law Usury Claims into Federal Causes Of Action 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944) 17

Atherton v. FDIC, 519 U.S. 213 (1997) 17

Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968) 3, 13, 14

Blab T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc., 182 F.3d 851 (11th Cir. 1999) 8, 10, 11

Caterpillar Inc. v. Williams, 482 U.S. 386 (1987) 5, 10

Davis v. Elmira Sav. Bank, 161 U.S. 275 (1896) 17

El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999) 9, 10

First Nat'l Bank v. Commonwealth, 76 U.S. 353 (1869) 16, 17, 18

First Nat'l Bank in St. Louis v. Missouri, 263 U.S. 640 (1924) 17

Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983) 5, 14

Franklin Nat'l Bank v. New York, 347 U.S. 373 (1954) 16

Gore v. Trans World Airlines, Inc., 210 F.3d 944 (8th Cir. 2000) 10

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981) 6

Gully v. First Nat'l Bank, 299 U.S. 109 (1936) 5

Husmann v. Trans World Airlines, Inc., 169 F.3d 1151 (8th Cir. 1999) 11

TABLE OF AUTHORITIES – Continued

Page

Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908) 4

McClellan v. Chipman, 164 U.S. 347 (1896) 16

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) ..... *passim*

Osborn v. Bank of the United States, 22 U.S. 738 (1824) 4

Peters v. Union Pac. R.R. Co., 80 F.3d 257 (8th Cir. 1996) 11

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 18

Rodriguez v. United States, 480 U.S. 522 (1987) 9

Rosciszewski v. Arete Assocs., Inc., 1 F.3d 225 (4th Cir. 1993) 11

Stone v. Powell, 428 U.S. 465 (1976) 19

Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957) 13

Wichita Royalty Co. v. City Nat'l Bank of Wichita Falls, 306 U.S. 103 (1939) 17

FEDERAL STATUTES

12 U.S.C. § 94 15

28 U.S.C. § 1331 ..... 4, 5, 7

28 U.S.C. § 1346(b) 9

28 U.S.C. § 1441 ..... 5, 7

29 U.S.C. § 185 13

42 U.S.C. § 2014(h)(h) 3, 9

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 2210(n)(2) 3, 9

45 U.S.C. §§ 151-63 11

45 U.S.C. §§ 181-88 11

45 U.S.C. § 434 11

47 U.S.C. § 532 11

49 U.S.C. § 20106 11

Act of July 27, 1868, 15 Stat. 226-27 19

National Bank Act, § 85 ..... 15, 18

National Bank Act, § 86 ..... 15, 18

Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 9

Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066 9

OTHER AUTHORITIES

H.R. Conf. Rep. No. 93-1280 (1974) 12

Miller, Arthur A., *Artful Pleading: A Doctrine in Search of a Definition*, 76 Tex. L. Rev. 1781 (1998) 1, 6, 8, 10

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INTEREST OF THE *AMICI*

The question presented is whether the doctrine of complete preemption applies to state-law usury claims filed in state court against a national bank. The *amici* States have two discrete interests in the resolution of that question.

First, the doctrine of complete preemption affects important federalism interests. Under the well-pleaded complaint rule, state courts have the initial opportunity to resolve whether a state-law claim is preempted by federal law. That rule is a core component of the division of responsibility between state and federal courts, and reflects Congress's recognition of the competence of state courts. *See* Arthur A. Miller, *Artful Pleading: A Doctrine in Search of a Definition*, 76 Tex. L. Rev. 1781, 1797 (1998) (noting "the obvious federalism implications of the complete-preemption doctrine and its inconsistency with the well-pleaded complaint rule"). The *amici* States have an abiding interest in ensuring that this division of responsibility is not unjustifiably revised to lessen the role of state courts.

Second, the *amici* States have a significant interest in the extent to which the National Bank Act (NBA) is found to preempt state law. Although this case involves only a discrete section of the NBA, it is important to the States that this Court not waver from its long-standing precedent that the States retain concurrent jurisdiction over national banks operating within their borders.

SUMMARY OF ARGUMENT

At issue in this case is when complete preemption occurs, such that a state-law claim is converted into a federal claim by operation of law and may, therefore, be removed to federal court. This Court presently has before it two competing theories. Petitioners and the United States contend that complete preemption occurs whenever a plaintiff asserts a state-law claim that falls within the scope of "an exclusive federal cause of action" created by Congress. Pet. Br. 21; U.S. Br. 10. The Eleventh Circuit adopted the position that complete preemption in addition requires "clear congressional intent to permit removal." Pet. App. 4a. *Amici* submit that neither of these competing theories adequately explains when the doctrine applies.

Petitioners and the United States are correct in recognizing that the ultimate question does not center on removal *per se*, but on whether the state-law claim must be deemed federal in nature by operation of law. Once that transformation takes place, the federal courts have original and removal jurisdiction over the claim. It therefore does not matter whether Congress expressed any specific intent regarding removal. But Petitioners and the United States wrongly conclude that Congress intended certain types of state-law claims to be converted into federal claims. Simply put, it is one thing for Congress to enact a preemptive federal rule and concomitant federal cause of action; it is a far different thing for Congress to enact a rule that converts plaintiffs' state-law claims into federal claims. Such a rule does not, as a matter of logic, precedent, or policy, ineluctably follow from the former enactments.

Congress has long accepted the well-pleaded complaint rule and its ramifications, the most notable of which is the maintenance in state court of state-law claims subject to the defense of preemption. When Congress desires a different procedure, it can expressly provide for one, as it did in the Price-Anderson Act. *See* 42 U.S.C. §§ 2014(h)(h), 2210(n)(2) (deeming all actions asserting liability arising from nuclear incidents to be federal actions). Congress can also implicitly provide for the conversion of state-law claims into federal claims, as this Court found it did in Section 301 of the Labor Management Relations Act (LMRA), *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968), and in Section 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA), *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987). But absent congressional intent specific to the conversion of state-law claims into federal claims – as distinct from the intent to create an exclusive federal cause of action – there is no basis upon which to convert a plaintiff's claim by operation of law from a state-based claim into a federal claim. In *Taylor*, this Court found complete preemption only after applying precisely this approach.

When this standard is applied to the usury provisions of the National Bank Act, the result is affirmance of the Eleventh Circuit. Section 30 of the National Bank Act neither explicitly nor implicitly provides that state-law claims should be deemed federal by operation of law. It necessarily follows that the NBA does not convert state-law usury claims into federal claims. The United States' contention that the NBA mandates freedom from state laws is both irrelevant and incorrect: this Court has long and consistently held that national banks are subject to

numerous state laws. The proper outcome of this case, therefore, is for the Alabama state court to determine whether the NBA preempts application of the state usury law against Petitioners.

ARGUMENT

THE DOCTRINE OF COMPLETE PREEMPTION DOES NOT APPLY TO A STATE-LAW CLAIM WHICH A NATIONAL BANK ASSERTS IS PREEMPTED BY THE USURY PROVISIONS OF THE NATIONAL BANK ACT.

A. State-Law Claims Are Generally Not Removable to Federal Court Merely Because the Defense of Preemption Is Asserted.

Congress has never authorized federal courts to hear claims under their "arising under" jurisdiction to the full extent permitted by the Constitution. In *Osborn v. Bank of the United States*, 22 U.S. 738, 822-23 (1824), the Court held that "arising under" jurisdiction within the meaning of Article III, Section 2, exists when the resolution of a federal question might determine the outcome of the case. In a series of cases culminating in *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908), however, the Court construed 28 U.S.C. § 1331 as giving federal courts far narrower "arising under" jurisdiction. In *Mottley*, the Court ruled that a federal court lacks subject-matter jurisdiction under § 1331 if the plaintiff's complaint asserts on its face only state-law causes of action, regardless of whether the defendant asserts (or can be expected to assert) federal defenses such as preemption. 211 U.S. at 152.

Concomitantly, this Court has held that an action "may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). Cases may be removed under 28 U.S.C. § 1441(a) only if district courts "have original jurisdiction" over the action; and the well-pleaded complaint rule governs whether such original jurisdiction exists. Ever since Congress amended the removal statute in 1887, original and removal jurisdiction have been understood as co-extensive. *See Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10-11 & n.9 (1983).

Several policies are furthered by Congress's embrace of the well-pleaded complaint rule through its enactment of, and amendments to, §§ 1331 and 1441, and its acceptance of the Court's construction of those provisions. Writing for the Court in *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936), Justice Cardozo emphasized the practical advantages of the rule. "If we follow the ascent far enough," he wrote, "countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself." *Id.* at 118. The well-pleaded complaint rule is necessary, therefore, "[t]o set bounds to the pursuit. . . . We shall be lost in a maze if we put that compass by." *Id.* More concretely, plaintiffs may incorrectly anticipate defendants' defenses, the federal issue in a case may not become apparent until well after the litigation has proceeded in state court, and federal defenses may be "concocted purely to confer jurisdiction." Richard Posner, *The Federal Courts: Crisis and Reform* 190 (1985).

The well-pleaded complaint rule also serves the interests of federalism. The rule apportions cases between the state courts and federal courts in a manner that leaves state courts with considerable responsibility for construing federal law. That delegation of power to state courts reflects Congress's recognition that state courts are fully capable of discharging their constitutional mandate to construe federal law. *See* Miller, *supra,* at 1782 (the well-pleaded complaint rule "reflects ... the constitutional compulsion to properly distribute judicial jurisdiction between the state and federal courts"). It is also consistent with the state courts' historical role as arbiters of federal law. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 & n.4 (1981).

B. The Well-Pleaded Complaint Rule Only Permits Removal of a State-Law Claim When Congress Specifically Intended That Type of Claim to be Transformed, by Operation of Law, into a Federal Claim.

In the ordinary case, when a plaintiff asserts a claim in state court that is preempted by federal law two things will transpire: the plaintiff will lose the case; and a state court, not a federal court, will issue that ruling. On rare occasion – when the doctrine of "complete preemption" applies – the case plays out very differently: the otherwise preempted state-law claim is converted by rule of law into a federal claim that is litigated in federal court. The issue before the Court is when this transformation of a state-law claim into a federal claim by operation of law should occur. The answer, we submit, is a simple one: when Congress specifically intends that outcome.

This congressional-intent rule differs in important ways from the positions advanced by Petitioners and the United States, on the one hand, and the Eleventh Circuit, on the other. Petitioners and the United States would make dispositive Congress's creation of an exclusive federal cause of action. Pet. Br. 21; U.S. Br. 10. Once Congress creates an exclusive federal cause of action, they argue, it follows that Congress also mandates the conversion of a state-law claim falling within the scope of that cause of action into a federal claim. But neither Petitioners nor the United States persuasively explains why that is so. As explained below, Congress is perfectly capable of expressing its specific intent to convert state-law claims into federal claims governed by an exclusive federal cause of action. When Congress elects not to express that intent, a strong presumption must exist that Congress did not intend to carve out an exception to the ordinary procedure applicable to preemption cases.

This congressional-intent rule differs in one fundamental respect from the rule adopted by the Eleventh Circuit. According to the court of appeals, the complete preemption doctrine applies only where there is "clear congressional intent to permit removal." Pet. App. 4a. The touchstone of the complete preemption doctrine, however, is not removal *per se*, but the conversion of a state-law claim into a federal claim. Once that conversion occurs, the claim could be brought in federal court either originally or through removal, just like any other federal claim. *See* 28 U.S.C. §§ 1331, 1441. The pivotal congressional

intent, therefore, is not an "intent to permit removal," but an intent to convert state-law claims into federal claims.[1]

1. Congressional intent to create an exclusive federal cause of action does not, by itself, establish congressional intent to convert a state-law claim into a federal claim by operation of law.

As a matter of pure logic, there is no necessary connection between creating an exclusive federal cause of action and converting otherwise preempted state claims into federal claims asserting that federal cause of action. Congress preempts state laws for a variety of reasons and through a variety of means. *See generally* Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 226-29 (2000) (discussing and contrasting "express preemption," "conflict preemption," and "field preemption"). As is obvious from the continued acceptance of the well-pleaded complaint doctrine, Congress's intent to preempt state law does not imply any intent to convert a preempted state-law claim into a federal claim.

[1] This characterization of the Eleventh Circuit's opinion is consistent with how Petitioners and the United States have characterized it. *See* Pet. Br. 29-32; U.S. Br. 26-27. We recognize, however, that this reading of the opinion may be a strawman. The court of appeals relied extensively (Pet. App. 5a-6a, 8a-9a, 15a) on its prior opinion in *Blab T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc.*, which focused not merely on congressional intent to permit removal, but on congressional intent to "'transform[ ] the state cause of action into a federal [one].'" 182 F.3d 851, 857 (11th Cir. 1999) (quoting Miller, *supra* at 1797-98). As argued in the above text, that latter focus is the correct one.

Congress also has a variety of reasons for creating federal causes of action that can be asserted in the place of preempted state-law claims. Most obviously, Congress often wishes to provide a private right of action for a particular injury, but wants the substantive law governing that action to be uniform across the country. In other instances, state law is "borrowed" and incorporated to furnish the governing federal rule, subject to specific federal remedies desired by Congress. *See, e.g.*, the Federal Tort Claims Act, 28 U.S.C. § 1346(b) ("law of the place where the act or omission occurred" is controlling). Neither objective, however, can be achieved *only* if Congress additionally mandates that courts rewrite complaints filed in state court that assert state-law claims of the type covered by an exclusive federal cause of action. *Cf. Rodriguez v. United States*, 480 U.S. 522, 526 (1987) ("no legislation pursues its purposes at all costs. . . . [I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."). A run-of-the-mill dismissal of a preempted state-law claim does not in any way undermine the governing federal rules adopted by Congress.

To be sure, Congress might conclude that public policy would be served by declaring that state-law claims be converted into claims arising under exclusive federal causes of action. Congress did just that when it amended the Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576, through the Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066. Through "its unusual preemption provision, *see* 42 U.S.C. § 2014(h)(h), the Price-Anderson Act transforms into a federal action 'any public liability action arising out of or resulting from a nuclear incident.' § 2210(n)(2)." *El Paso Natural Gas Co. v.*

Neztsosie, 526 U.S. 473, 484 (1999). The statute thereby establishes original and removal jurisdiction over such causes of action in federal court – regardless of how those actions are initially pled by the plaintiff. *Cf. id.* at 484 n.6 (observing that the structure of the Price-Anderson Act "resembles" the complete preemption doctrine).

Express "conversion" provisions of this sort are "rare," *id.* at 485-86 n.7 – far rarer than the creation of exclusive federal causes of action. The obvious inference to be drawn is that Congress is aware of the option of transforming preempted state-law claims into federal claims, but chooses to exercise that option sparingly. It is common ground that the intent of Congress is the touchstone for determining whether the complete preemption doctrine applies. Under the Petitioners' and United States' position, however, that intent is "sometimes divined and sometimes fabricated." Miller, *supra*, at 1821. Far better, we submit, to rely on Congress specifically to instruct when it wants state-law claims converted into federal causes of action.

Moreover, this Court has described statutes that completely preempt state laws as "extraordinary." *Taylor*, 481 U.S. at 65, *quoted in Caterpiller*, 482 U.S. at 393. Yet, as the Eleventh Circuit observed in a prior decision, "[i]f the creation of a federal cause of action served as the sole litmus test for congressional intent, . . . complete preemption would be common rather than extraordinary." *Blab T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc.*, 182 F.3d 851, 859 n.3 (11th Cir. 1999).

The Eighth Circuit, which applies the liberal standard suggested by Petitioners, has ruled that three federal statutes, in addition to the NBA, completely preempt state-law claims. *See Gore v. Trans World Airlines, Inc.*,

210 F.3d 944 (8th Cir. 2000) (the Railway Labor Act, 45 U.S.C. §§ 151-63; 181-88); *Husmann v. Trans World Airlines, Inc.*, 169 F.3d 1151 (8th Cir. 1999) (the Warsaw Convention); *Peters v. Union Pac. R.R. Co.*, 80 F.3d 257 (8th Cir. 1996) (the Federal Railroad Safety Act, 49 U.S.C. § 20106 (previously 45 U.S.C. § 434)). The Fourth Circuit has held that Section 301(a) of the Copyright Act completely preempts state-law claims. *See Rosciszewski v. Arete Assocs., Inc.*, 1 F.3d 225, 232-33 (4th Cir. 1993). And the Eleventh Circuit suggested that, were it bound by Petitioners' standard, Section 612 of the Cable Communications Policy Act of 1984, 47 U.S.C. § 532, would be completely preemptive. *Blab T.V.*, 182 F.3d at 858-59 & n.3. The list of exclusive federal causes of action presumably is longer still. If the well-pleaded complaint rule is to be side-stepped so frequently, it should be based on a specific congressional directive.

2. This Court's decisions confirm that the complete preemption doctrine applies only when Congress specifically intended to convert state-law claims into federal claims by operation of law.

The two instances in which this Court has found complete preemption confirm that a state-law claim is removable under the complete preemption doctrine only when Congress has specifically expressed its intent to convert that type of claim into a federal claim. Particularly instructive is *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), in which the Court held that Section 502(a) of ERISA completely preempted an employee's common law contract and tort claims asserting improper processing of a claim for benefits under an ERISA plan. The Court took

note of the federal cause of action created by § 502(a), which "lies at the heart of a statute with . . . unique pre-emptive force," but stated that without additional indicia of congressional intent it "would be reluctant to find that extraordinary pre-emptive power . . . that converts an ordinary state common law complaint into one stating a federal claim for purpose of the well-pleaded complaint rule." 481 U.S. at 65.

The Court found the necessary evidence that Congress specifically intended state-law claims falling within the scope of § 502(a) to be converted into federal claims. The Court first observed that "the language of the jurisdictional subsection of ERISA's civil enforcement provisions closely parallels that of § 301 of the LMRA" (*id.*) – which the Court in *Avco* found mandates the conversion of state-law claims. The Court next pointed to explicit statements in the legislative history of ERISA speaking to this precise issue, quoting from the portion of the Conference Report describing ERISA's civil enforcement provisions: "All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." *Taylor,* 481 U.S. at 65-66 (quoting H.R. Conf. Rep. No. 93-1280, p. 327 (1974)) (internal quotation marks and emphasis omitted).

The Court continued:

> No more specific reference to the *Avco* rule can be expected and the rest of the legislative history consistently sets out this clear intention to make § 502(a)(1)(B) suits . . . federal questions for the purposes of federal court jurisdiction in like manner as § 301 of the LMRA.

Id. at 66. The Court then summarized its understanding of the complete preemption doctrine, stating that "the touchstone of the federal district court's removal jurisdiction is not the 'obviousness' of the pre-emption defense but the intent of Congress." *Id.* at 66. The only fair reading of the Court's opinion is that the intent to which the Court referred was the intent to convert state-law claims into federal claims, not the mere intent to create an exclusive federal cause of action.[2]

The other statute the Court has found to completely preempt state-law claims is, as noted, Section 301 of the LMRA, 29 U.S.C. § 185. In *Avco*, the Court (without using the term "complete preemption") held that a state-law breach of contract claim alleging that a union breached a "no strike" clause in a collective bargaining agreement may be removed because it is "[a]n action arising under § 301" and "is controlled by federal substantive law even though it is brought in state court." 390 U.S. at 560. The *Avco* opinion did not explain the reasoning behind its conclusion, apparently because it believed the issue was largely resolved in *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957).

Immediately prior to announcing its holding, *Avco* quoted the portion of *Lincoln Mills* which held that "the substantive law to apply in suits under § 301(a) is federal law" and that

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[2] Justice Brennan, in a concurring opinion to *Taylor*, wrote separately "only to note that today's holding is a narrow one," reaffirming that removal jurisdiction exists only when "Congress has clearly manifested an intent to make causes of action . . . removable to federal court." *Id.* at 67-68 (Brennan, J., concurring) (alteration in original).

> state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. * * * *Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.*

Avco, 390 U.S. at 559-60 (quoting *Lincoln Mills*, 353 U.S. at 456-57) (emphasis added). *Avco* construed that final sentence as meaning "[a]ny state law applied" – even if asserted in the form of a state-law claim – "will be absorbed as federal law." This explains why the Court, directly after the above-quoted language, stated that Avco Corporation's state-law claim was federal in nature and, therefore, "ar[ose] under the 'laws of the United States' within the meaning of the removal statute." *Avco*, 390 U.S. at 560. No further explanation was needed.

Avco is therefore consistent with the proposition that the key intent in the complete preemption analysis is the intent to convert (or "absorb") state claims into federal claims. At the very least, it is a decision that did not seek to – and therefore does not – provide guidance regarding the contours of the doctrine that 15 years later, in *Franchise Tax Board, supra*, was given the name "complete preemption." 463 U.S. at 24.

In *Franchise Tax Board*, the Court stated that "[t]he necessary ground of [the *Avco*] decision was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization. Any such suit is purely a creature of federal law. . . ." *Id.* at 23 (footnote and internal quotation marks omitted). That explanation, however, begs the question: what made "the preemptive force of § 301 . . . so powerful"? *Id.* The Court

provided an answer four years later in *Taylor*, when it searched for congressional intent specific to the conversion of state-law claims into federal claims.

C. There Is No Basis Upon Which to Conclude That Congress, Through the National Bank Act, Intended to Convert State-Law Usury Claims into Federal Causes of Action.

Neither the text nor the legislative history of §§ 85 and 86 of the National Bank Act shows any specific intent to convert state-law usury claims into federal claims. In contrast to § 502(a) of ERISA, the language of the NBA's jurisdictional provision, 12 U.S.C. § 94, does not closely parallel the language of the LMRA's jurisdictional provision. And whereas the legislative history of ERISA demonstrates that Congress intended federal jurisdiction under ERISA to be co-extensive with that under the LMRA, the legislative history of the NBA is barren of any evidence suggesting an intent to convert state-law usury claims into federal claims.

At bottom, § 85 of the NBA borrows the laws of the home states of national banks as federal limits, and § 86 creates a federal cause of action that plaintiffs are free to invoke if they choose. For the reasons set forth in Section B, *supra*, that is insufficient to effectuate complete preemption. State-law usury claims are not converted by operation of law into federal claims arising under NBA, § 86. Respondents' case was properly remanded to state court, which is well able to determine whether state-law usury claims are preempted. Petitioners' and the United States' arguments to the contrary have no merit.

First, the United States emphasizes the important purposes behind the NBA, and in particular the intent "to create a . . . sound and stable system of banking institutions to support national economic development" (U.S. Br. 23), and one "that could not be disrupted by state legislation." U.S. Br. 24; *see also* Pet. Br. 12-13. In the first place, that history cannot take the place of the required congressional intent specific to the transformation of state-law claims into federal claims.

Furthermore, the United States and Petitioners elide this Court's long-standing recognition that national banks are subject to state laws and a dual system of enforcement. In 1870, this Court rejected a preemption challenge to a State's collection of a bank shares tax, declaring that national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation . . . It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." *First Nat'l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 361-62 (1869).

In *McClellan v. Chipman*, 164 U.S. 347, 359 (1896), this Court rejected a bank's "assertion that national banks in virtue of the [NBA] are entirely removed, as to all their contracts, from any and every control by the state law," holding that state laws govern the business transactions of national banks except in areas where Congress expressly preempts state law or state law would impair the efficiency of the banks in carrying out their duties imposed by federal law. Numerous other decisions by this Court affirmed the rule that national banks remain subject to many state laws. *See, e.g., Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378 n.7 (1954) ("national banks may be

subject to some state laws in the normal course of business if there is no conflict with federal law"); *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 656 (1924) ("national banks are subject to the laws of a State in respect to their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States"); *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 290 (1896) ("Nothing, of course, in this opinion is intended to deny the operation of general and undiscriminating state laws on the contracts of national banks, so long as such laws do not conflict with the letter or the general objects and purposes of congressional legislation").

Most recently, in *Atherton v. FDIC*, 519 U.S. 213, 222-23 (1997), this Court reaffirmed the principle that "federally chartered banks are subject to state law" and, pointing to its earlier decisions, stated that it has "found numerous state laws applicable to federally chartered banks." The Court has upheld application to national banks of a state statute prohibiting branch banks, *First Nat'l Bank in St. Louis*, 263 U.S. at 656, state tort law, *Wichita Royalty Co. v. City Nat'l Bank of Wichita Falls*, 306 U.S. 103 (1939), and a state statute administering abandoned deposit accounts, *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 247-52 (1944). Moreover, in *Atherton* the Court approvingly quoted the passage from *First National Bank v. Commonwealth* that national banks' "acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law." *Atherton*, 519 U.S. at 223 (quoting

First National Bank, 76 U.S. at 362). Any suggestion by Petitioners or the United States that national banks are uniquely immune from state law is simply incorrect.[3]

Second, Petitioners argue that applying a strict complete preemption standard is unfair to national banks because Congress enacted the National Bank Act prior to its enactment of the removal statute. Pet. Br. 30. But that merely reinforces our point. When Congress enacted the NBA in 1864, it gave both state and federal courts jurisdiction over suits against national banks. Yet suits filed against national banks in state court had to remain there because Congress had not yet authorized removal of such actions to federal court – and did not until it enacted the general removal statute in 1875. Congress therefore had no reason to mandate that state-law usury claims are transformed by operation of law into federal claims. Any suggestion that Congress in 1864 intended the transformation of state-law claims is utterly implausible.

Nor has Congress taken any action since that time to suggest an intent to transform state-law usury claims into

[3] The United States also invokes the doctrine of field preemption to support its position. U.S. Br. 19 & n.3. This fails for two interrelated reasons. First, as discussed above, the NBA has not been understood to occupy the field of regulation of national banks. Second, even if pure state-law usury claims against national banks are preempted by §§ 85 and 86 of the NBA, this would not mean that the NBA therefore preempts the "field" of state-law usury claims. Such a leap would make the concept of field preemption meaningless. When a federal law preempts a state law, one can always label the preempted subject matter a "field." But field preemption means something more, and does not fit here. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (field preemption may be inferred when the federal regulatory scheme is "pervasive").

federal claims arising under NBA, § 86. In 1868, Congress authorized the removal to federal court of actions filed against corporations organized under federal law – but expressly excluded national banks. Act of July 27, 1868, 15 Stat. 226-27, quoted in Pet. App. 12a. And Congress's enactment of the general removal statute in 1875 obviously evinced no particular intent regarding the transformation of state-law usury claims under the NBA. It is not the responsibility of this Court to rewrite the legislation in light of changed circumstances. Congress is fully capable of amending the NBA if it concludes that public policy would best be served by the transformation and removal of state-law usury claims filed in state court.

Finally, Petitioners and *amici* American Bankers Association, *et al.* argue that Petitioners' approach to complete preemption is justified by the need for federal court resolution of preemption issues involving national banks. Pet. Br. 32-33 n.22; ABA Br. 23-29. This lack of confidence in the ability of state court judges to decide federal preemption issues is inconsistent with bedrock principles of American jurisprudence and repeated statements by this Court. As Justice Powell wrote for the Court in *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976), "we are unwilling to assume that there now exists a general lack of appropriate sensitivity to [federal] rights in the trial and appellate courts of the several States." Continuing, he added, "there is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned . . . than his neighbor in the state courthouse." *Id.* (citation and internal quotation marks omitted).

In the 139 years since Congress enacted the NBA, there has been no tradition of complete preemption of

state-law usury claims against national banks and no evidence of congressional intent to establish complete preemption. This Court should not accept the invitation of Petitioners and the United States to fabricate such an intent into the NBA.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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In The

Supreme Court of the United States

BENEFICIAL NATIONAL BANK AND
BENEFICIAL TAX MASTERS, INC.,

Petitioners,

v.

MARIE ANDERSON, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR THE CONSUMER ATTORNEYS OF CALIFORNIA, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF *AMICUS CURIAE*.. 1

SUMMARY OF ARGUMENT..... 3

ARGUMENT 4

I. THERE IS NO HISTORICAL OR LEGAL JUSTIFICATION FOR IGNORING THE WELL-PLEADED COMPLAINT RULE HERE AND DISREGARDING THE INTERESTS OF THE STATES IN REGULATING BANKS..... 4

II. THE PROVISIONS OF THE NATIONAL BANK ACT DO NOT MANIFEST CONGRESS' INTENT TO COMPLETELY PREEMPT STATE USURY LAWS FOR PURPOSES OF REMOVAL JURISDICTION..... 9

III. THE STATES HAVE TRADITIONALLY LEGISLATED IN AREAS AFFECTING BANKING PRACTICES..... 11

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944) 8

Arkansas Electric Cooperative Corp. v. Arkansas Public Serv. Comm'n, 461 U.S. 375 (1983) 7

BLAB T.V. of Mobile, Inc. v. Comsat Cable Communications, Inc., 182 F.3d 851 (11th Cir. 1999) 9, 10, 11

California v. ARC America Corp., 490 U.S. 93 (1989) 11, 12, 16

Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) 5, 9

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 3, 6

Committee of Dental Amalgam Manufacturers & Dist. v. Stratton, 92 F.3d 807 (9th Cir. 1996) 12

First Nat'l Bank v. Dickinson, 396 U.S. 122 (1969) 8

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Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) 9

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Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) 9, 10, 11

TABLE OF AUTHORITIES – Continued

Page

McClelland v. Gronwaldt, 155 F.3d 507 (5th Cir. 1998) 14

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New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989) 7

Perdue v. Crocker National Bank, 702 P.2d 503 (CA, 1985), *appeal dismissed*, 475 U.S. 1001 (1986) 8, 12, 13, 14, 15

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 13

Smiley v. Citibank, 900 P.2d 690 (CA, 1995), *aff'd on other grounds*, 517 U.S. 735 (1996) 8, 14, 15, 16, 17

Sprietsma v. Mercury Marine, ___ U.S. ___, 123 S.Ct. 518 (2002) 3

The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913) 5

Valley Bank v. Plus System, Inc., 914 F.2d 1186 (9th Cir. 1990) 12

STATUTES

12 U.S.C. § 85 ..... *passim*

12 U.S.C. § 86 ..... 1, 3, 4, 5, 14

29 U.S.C. § 185 10

29 U.S.C. § 1001 4

29 U.S.C. § 1132(a) 10

Alabama Code § 8-8-1 5

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Consumer Attorneys of California (hereinafter "CAOC") is a voluntary membership organization of more than 3,000 consumer attorneys practicing throughout California.[1] The organization was founded in 1962 and its members predominantly represent individuals subjected in a variety of ways to consumer fraud practices, employment discrimination, personal injuries and insurance bad faith. Consumer Attorneys of California has taken a leading role in advancing and protecting the rights of consumers and injured victims in both the courts and the Legislature.

The issue of whether claims involving usury against a national bank necessarily arise under section 30 of the National Bank Act, 12 U.S.C. §§ 85-86 ("NBA"), and completely preempt and displace all state statutory and common laws on this subject is of critical importance not only to the Consumer Attorneys of California and their clients but to the public in general. As part of its efforts to preserve and protect the rights of California consumers, the members of CAOC prosecute plaintiff and plaintiff class actions to challenge practices and policies of financial institutions which cause economic harm and loss to consumers including the national banks.

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[1] This brief was authored solely by the amicus and counsel listed on the cover; no part was authored by counsel for a party. No one other than the amicus or its counsel made any monetary contributions to the preparation or submission of this brief. All parties have consented to the filing of this amicus curiae brief. The consent letters are being filed with the Court along with this brief.

The CAOC is concerned that if this Court were to conclude that section 30 of the NBA completely preempts and displaces state law, and that Congress intended that banks facing usury claims in state court should have the ability to remove the case to a federal forum, this will severely impact the well-established right of plaintiffs to choose a state court as the forum in which to litigate state statutory and common law claims against banks. Moreover, if this Court were to so broadly construe sections 85 and 86 as to preempt and displace state-law claims which only remotely relate to the rate of "interest" charged by a national bank, the rights of the states to enact and enforce state laws to protect their citizens in matters concerning national banks will be severely impaired.

The concerns of the CAOC regarding the adverse impact of a decision by this Court that the NBA completely preempts all state usury laws is particularly warranted here because this case comes to this Court in the procedural context of removal and remand issues.[2] No evidence

[2] Petitioners argue that all of respondent's claims (all of which were based on state law) are nothing more than claims alleging usurious interests against a national bank, which *necessarily* arise under federal law *and* also give Petitioners the right to remove to federal court. Petitioners agree that "under the 'well-pleaded complaint' rule, a state-law claim may not be removed merely because the state-law claim is likely to be met by a federal defense (including a defense of federal preemption)". Brief for Petitioners, p. 9. However, Petitioners go on to assert that in this case, "that is not the situation here, where the usury claim itself *can only* arise under federal law, regardless of the label placed on that claim by the plaintiffs." (*Id.*) [emphasis added]. Petitioners and amicus United States assume that Congress intended to give banks sued for usury not just the ability to assert preemption as a defense, but *also* the ability to remove the case to a federal forum. The assertion by Petitioners that federal law provides the *exclusive* basis for

(Continued on following page)

was ever presented to the district court that the subject state laws are preempted and should not be enforced against Petitioners because this will interfere with or significantly impede the ability of national banks in general, to lawfully carry out the business of banking.

The CAOC thus submits this brief to explain why, under our Constitution, laws, and federal system of government, this Court should affirm the judgment of the Eleventh Circuit Court of Appeals and reject Petitioners' efforts to eviscerate a plaintiff's traditional right to select the law under which she will pursue her legal remedies as well as the forum in which she will litigate her state law based claims.

SUMMARY OF ARGUMENT

There is a long-standing presumption against preemption, which is rooted in the concept of federalism. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Petitioners seek to cast aside this presumption in favor of removal. There is no reason to conclude, as Petitioners do, that in enacting section 30 of the National Bank Act, 12 U.S.C. §§ 85 and 86, Congress intended to completely

plaintiffs' state law claims is especially troubling since it is tantamount to an assertion that plaintiffs' remedies will be limited to those provided by federal law. Such a result gives short-shrift to principles of federalism and a state's historic ability to fashion state law to remedy harm caused by a bank against its citizenry. *See generally, Sprietsma v. Mercury Marine*, ___ U.S. ___, 123 S.Ct. 518, 527 (2002) (Even when federal law expressly preempts state law, it would be rational for Congress not to preempt common law claims which necessarily perform an important remedial role in compensating victims.)

preempt and displace all state statutory and common law involving usury (such as, for example, Congress did in the area of employee health benefits when it enacted the Employee Retirement Income Securities Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*) If state law conflicts with sections 85 or 86, a national bank may assert preemption as a defense. If a national bank is sued in state court exclusively for state law based claims and these claims involve usury, there is nothing in the NBA to suggest that Congress intended to allow a defendant to recast these state law claims as ones necessarily arising from and based *exclusively* on federal law and that the defendant also has the right to remove these claims to federal court.

If complete preemption were to apply in cases such as the instant one, the historical powers of states to legislate and enforce consumer protection laws governing financial institutions, including national banks, and a citizen's right to choose what state-based consumer protection rights to litigate and in what forum, will be jeopardized.

ARGUMENT

I. THERE IS NO HISTORICAL OR LEGAL JUSTIFICATION FOR IGNORING THE WELL-PLEADED COMPLAINT RULE HERE AND DISREGARDING THE INTERESTS OF THE STATES IN REGULATING BANKS

As the court of appeals points out, the Plaintiffs (Respondents herein) alleged only state-law claims in their

complaint.[3] Nevertheless, Petitioners characterize all five causes of action as nothing more than claims arising under federal law and thus removable to federal court. Petitioners argue that "Congress has so forcefully exercised its constitutional power to supplant state law," that under the complete preemption corollary to the well-pleaded complaint rule, plaintiff's state-law based claims are "transformed into a federal claim and may be removed to federal court." Petitioners' Brief, p. 10. However, as the court of appeals correctly concluded, Congress did not intend sections 85 and 86, to preempt completely such state law based claims and thus provide a defendant with the ability to remove such cases to federal court.

It is axiomatic that in our federalist system, a plaintiff is free to choose whether to assert a state or federal claim. The plaintiff is "the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987); *see also The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("Of course, the party who brings a suit is master to decide what law he will rely upon") (Holmes, J.). The states are free, through enactment of state laws or by state common law, to make certain conduct unlawful for the protection of consumers.

As this Court has also observed, because the states are "independent sovereigns" in our federal system, "[c]onsideration of issues under the Supremacy Clause 'starts with the assumption that the historic police powers

[3] The causes of action alleged were for (1) fraud; (2) suppression; (3) breach of fiduciary duty; (4) charging an excessive interest rate under Alabama Code § 8-8-1 (1975); and (5) violation of the Alabama Mini-Code.

(11)

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26 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. THE "ALTERNATIVE FINANCIAL SECTOR" EXPLOITS VULNERABLE CONSUMERS WHO MUST RELY ON APPROPRIATE STATE REGULATION OF THEIR PRACTICES 6

A. The Nature of the Marketplace 6

B. The Evolution of Payday Loans Demonstrates Both Their Abusive Nature and Lenders' Ruses to Evade State-Imposed Interest Limits 11

1. Historical Background 11

2. Contemporary Payday Lending 12

3. Lenders' Relationships With National Banks Are Just the Latest in a History of Attempts to Evade Interest Caps 14

C. State Laws Protect Consumers From The Exploitative Practices of the AFS 17

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Brown v. ACE Cash Express, CA No. 24-C-01-004036 (Md. Cir. Ct. filed Aug. 20, 2001) 16

Brown v. Morris, Cowp. Rep. 792 18

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INTEREST OF *AMICI CURIAE*[1/]

AARP, Consumer Federation of America (CFA), National Association of Consumer Advocates (NACA), National

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[1/] Letters indicating the parties' consent to the filing of this brief have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their counsel, or their members made a monetary contribution to the preparation or submission of this brief.

Consumer Law Center (NCLC) and U.S. Public Interest Research Group (U.S. PIRG) ("*amici*") are organizations that devote a considerable amount of their work to advocating for the enactment and enforcement of strong state laws and regulations that protect consumers from exploitation in the credit marketplace. *Amici* recognize that low-income consumers, those whom mainstream lenders consider "high risk" borrowers, and consumers on fixed incomes often have difficulty finding credit on reasonable terms. They typically are relegated to high-cost lenders and non-traditional sources of credit, collectively referred to as the "fringe banking," "predatory lending," or "alternative financial sector" (AFS) industry where they often are subject to deceptive and unfair lending practices, such as hidden fees, exceedingly high interest rates, and extreme default penalties. Because the products that comprise these markets, including income tax refund anticipation loans (RALs) and payday loans, are particularly egregious and exploitative, *amici* have assisted in state legislative efforts to enact protections for consumers involved in these transactions, and have filed numerous *amicus curiae* briefs, often in support of state Attorney General and regulatory agency enforcement actions, urging courts to uphold these protections.

During their long histories as consumer advocates, *amici* have observed the need for enhanced protection of consumer rights and vigilant enforcement of laws designed for this purpose. RALs are just one in an array of products in a burgeoning industry that targets necessitous borrowers, the very people for whose protection usury limits exist. Yet, the companies that market these loans historically have engaged in a series of actions specifically designed to evade these protections. While their earlier actions involved disguising the true nature of the transactions and assigning labels other than loans to avoid disclosure and other statutory requirements, their association with national banks is just the latest in this series of efforts to circumvent these statutes.

AARP is a non-partisan, non-profit organization with more than 35 million members dedicated to addressing the needs and interests of people aged 50 and older. As the largest

membership organization serving this population, AARP is greatly concerned about unfair and deceptive financial products and services targeted at vulnerable consumers, including those related to mortgages, home equity loans, and other credit transactions. Because older Americans are disproportionately victimized by many of these practices, AARP supports laws and public policies to protect their rights in a broad range of marketplace transactions. Among these are measures that assure access to credit on fair and reasonable terms, prohibitions on oppressive conditions, and laws and regulations to protect consumers against deceptive and usurious credit practices. Due to its concerns about abuses in the alternative financial sector, AARP has published several reports on the issues involved and measures needed to protect consumers from lenders' most egregious practices. *See, e.g.*, Sharon Hermanson & George Gaberlavage, AARP, *The Alternative Financial Services Industry* (2001), and Elizabeth Renuart, AARP, *Payday Loans: A Model State Statute* (2000).

Consumer Federation of America (CFA) is a non-profit association organized in 1967 to advance the interests of consumers through advocacy and education. CFA's current membership is comprised of almost 300 national, state, and local consumer groups throughout the United States which, in turn, represent more than 50 million consumers. Recognizing the phenomenal growth and high cost of short-term consumer credit, CFA has made protecting the interests of individual consumers in this credit market a priority. CFA has published a series of reports on developments in the check cashing industry and the payday loan and RAL sectors, and advocates on credit consumer protections and application of payment method protections to prevent fraud and provide redress. *See, e.g.*, Jean Ann Fox & Edmund Mierzwinski, Consumer Fed'n of Am. & U.S. Pub. Interest Research Group, *Rent-A-Bank Payday Lending – How Banks Help Payday Lenders Evade State Consumer Protections* (2001). CFA is particularly concerned that effective consumer protections and disclosure rules serve consumers who obtain credit in the alternate financial sector.

The National Association of Consumer Advocates (NACA) is a non-profit organization whose members are private and public sector attorneys, legal services attorneys, law professors and students whose primary practice and areas of specialty involve consumer protection issues. NACA has appeared as *amicus curiae* in numerous federal and state court proceedings. Its mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members, as well as consumers, by curbing unfair and abusive business practices that adversely affect consumers.

The National Consumer Law Center, Inc. (NCLC) is a non-profit corporation established in 1969 to carry out research, education, and litigation regarding significant consumer matters. One of NCLC's primary objectives is to assist attorneys in representing the interests of their low-income and elderly clients in the area of consumer law. A major focus of NCLC's work has been to increase public awareness of, and to advocate protections against, high-cost loans and other forms of abusive credit extended to low-income consumers. NCLC publishes *The Cost of Credit: Regulation and Legal Challenges* (2d ed. 2000 & Supp. 2002), and *Truth in Lending* (4th ed. 1999 & Supp. 2002), among its many other treatises, to assist attorneys whose clients have been victimized by unfair, fraudulent, or deceptive lending practices. In addition, NCLC has directly assisted attorneys in scores of cases brought under federal and state credit protection statutes. The Federal Trade Commission (FTC) designated NCLC as the consumer representative in proceedings that led to the agency's promulgation of its Rules on Preservation of Consumers' Claims and Defenses, 16 C.F.R. Pt.433 (1998), and Credit Practices, 16 C.F.R. Pt.444 (1998).

The U.S. Public Interest Research Group (U.S. PIRG) serves as the national association of state Public Interest Research Groups. State PIRGs are non-profit, non-partisan consumer advocacy groups with a long history of supporting the strongest possible consumer protections against predatory financial practices. In addition to state and federal advocacy and publication of research reports and consumer education

materials about predatory lending, the state PIRGs have participated as *amicus curiae* in numerous cases opposing federal preemption of stronger state and local consumer laws.

Amici submit this brief in support of Respondents to inform the Court about the key products offered in the alternative financial sector and the widespread harm to the nation's vulnerable borrowers that will result if companies in this market are allowed to avoid compliance with state usury, small loan, and similar laws by partnering with national banks.

SUMMARY OF ARGUMENT

Low-income consumers and those whom mainstream lenders consider "high risk" often cannot find credit in the traditional market. Particularly when they need money in an emergency, they must rely on high-cost lenders and non-traditional sources of credit, collectively referred to as the "alternative financial sector" (AFS). Refund anticipation loans (RALs), payday loans, and automobile title pawns are the most common products offered in this market, at extremely high interest rates – triple digit and higher annual percentage rates (APRs) on these products are typical.

AFS lenders historically have characterized their products in various guises, attempting to avoid being subject to usury and other state interest rate limits. Most of these efforts involved disguising the true nature of the transactions and using labels other than loans. As courts and regulators uniformly looked at the substance of the transactions to reject these ruses, the lenders began to associate with national banks to take advantage of their ability to export their home state's interest rate to other states in which they make loans.

The AFS targets consumers most vulnerable to exploitative practices and least able to protect their interests. Usury, small loan, and other state consumer protection statutes are designed to protect these consumers, who often have little choice but to turn to these lenders due to their limited bargaining power and financial desperation. *See, e.g., Schneider v. Phelps*, 359 N.E.2d 1361, 1365 (N.Y. 1977) ("The purpose of usury laws,

from time immemorial, has been to protect desperately poor people from the consequences of their own desperation. . . . Lenders, with the money have all the leverage; borrowers, in dire need of money, have none."). Consumers who must resort to these lenders are among those with the greatest need for a marketplace that operates with integrity and the enforcement of state laws enacted for their especial benefit.

ARGUMENT

I. THE "ALTERNATIVE FINANCIAL SECTOR" EXPLOITS VULNERABLE CONSUMERS WHO MUST RELY ON APPROPRIATE STATE REGULATION OF THEIR PRACTICES

A. The Nature of the Marketplace

In order for the Court to fully appreciate the implications of its decision, it is important to understand the nature of the market in which RALs are offered. These loans are part of an industry popularly referred to as "fringe banking" or the "alternative financial sector" (AFS). *See* Roger Swagler, et al., *The Alternative Financial Sector: An Overview*, 7 Advancing the Consumer Interest 7 (1995); John R. Burton, et al., *The Alternative Financial Sector: Policy Implications for Poor Households*, 42 Consumer Interests Annual 279, 279 (1996). The AFS targets low-income, working poor, and minority consumers, and those with blemished credit histories, who cannot access traditional sources of money, credit, or certain consumer goods. This has resulted in the establishment of a two-tiered economy, often referred to as a system of "financial apartheid" or the "second-class" marketplace, in which middle-income and affluent consumers are served by federally-insured and regulated banks, and the poor and near-poor are relegated to expensive and, in many cases, poorly regulated alternatives. *See* Lynn Drysdale & Kathleen Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. Rev. 589, 591 (2000) [hereinafter Drysdale & Keest].

While many consumers have other ways to obtain short-term, unsecured loans, such as credit cards and checking accounts with overdraft lines of credit, the poor and near-poor lack access to these traditional sources of credit. A recent Federal Reserve survey found that approximately one-fourth of families did not have a credit card, and that despite widespread use of credit cards for borrowing, people in the lowest income group, families headed by persons sixty-five and older, and those who are not working are among the groups for whom such use is "notably lower." Ana M. Aizcorbe, et al., *Recent Changes in U.S. Family Finances: Results from the 1998 and 2001 Survey of Consumer Finances*, Fed. Res. Bull. 24-25 (2003), *available at* http://www.federalreserve.gov/pubs/bulletin/2003/0103lead.pdf. Coupled with the decline in the availability of small, unsecured loans from banks and finance companies, many consumers, particularly those with modest incomes or impaired credit, find that the AFS represents their only source of this type of credit. Well aware that they serve as one of the few ways these consumers can get necessary cash, lenders in this market maintain they merely are filling the credit gap created by traditional lenders. Even if this were a legitimate argument, and *amici* do not concede that it is, the provision of a necessary service neither justifies the practices that harm the very consumers these lenders claim to help nor supports providing them with a reduced level of legal protections.

A primary segment of the AFS features products that allow consumers to obtain an advance of a relatively small amount of cash, with repayment deferred for a relatively short period. The three main forms of these cash advances – RALs, payday loans, and auto title pawns – share the fact that they are extremely expensive, with triple digit annual percentage rates (APRs).

RALs – These loans provide cash against a customer's anticipated income tax refund. The cash advance is less than the expected refund, and the business that makes the advance keeps the difference. RALs generally are made by banks, including national banks, with tax preparers acting as loan brokers soliciting and facilitating the transaction. RAL

taxpayers generally are required to file their federal tax returns electronically, making the anticipated repayment period approximately ten days, at which time the business that advanced the money receives the full refund from the IRS. If the refund is less than the amount anticipated, the borrower is liable for the difference. RALs are very costly, in part because borrowers actually pay three fees: a tax return preparation fee, typically ranging from $60 to $300, paid to the commercial tax preparer; an electronic filing fee which averages $40; and a loan fee to the lender, generally set on a sliding scale based on the amount of the expected refund. *See* Chi Chi Wu, et al., Consumer Fed'n of Am. & Nat'l Consumer Law Center, *Tax Preparers Peddle High Priced Tax Refund Loans: Millions Skimmed From the Working Poor & U.S. Treasury* 5 (2002), *available at* http://www.nclc.org/initiatives/refund_anticipation/content/RAL_final.pdf. The cash advanced to the borrower is the refund minus the total of these fees.

Approximately 12.1 million RALs were made during the 2001 tax-filing season, and borrowers paid an estimated $907 million in RAL fees, an additional $484 million in electronic filing fees, and $400 million in document preparation or application fees, for a total of $1.8 billion. *See* Chi Chi Wu & Jean Ann Fox, Nat'l Consumer Law Center & Consumer Fed'n of Am., *The High Cost of Quick Tax Money: Tax Preparation, 'Instant Refund' Loans, and Check Cashing Fees Target the Working Poor* 1, 3 (2003), *available at* http://www.nclc.org/initiatives/refund_anticipation/content/2003_RAL_report.pdf. In addition to the aggregate figures, these loans are costly to the individual borrower: the loan fee charged on a ten-day loan costs from 97.4% to more than 2,000% APR, with the loan fee to borrow against the average $2,000 refund equaling an APR of 222.5%. *Id.* at 4.

Moreover, because refunds paid to RAL borrowers often include the Earned Income Tax Credit (EITC),[2/] a federal

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[2/] A recent report found that in tax year 1999, in some cities more than 50% of EITC recipients obtained RALs and nearly half the $30 billion in EITC claimed nationwide was refunded through RALs. *See* Alan Berube, Brookings Inst., *Rewarding Work Through the Tax Code: The Power and Potential of the Earned Income Tax Credit in 27 Cities and Rural Areas* 4, 10 (2003), *available at* http://www.brookings.org/dybdocroot/es/urban/publications/berubetaxcodenomaps.pdf.

benefit for low-income working families generally distributed in a lump sum, these huge interest rates divert considerable sums from federal benefits intended for these taxpayers. A recent report, using IRS data, concluded that for tax year 1999, the combined fees paid for RALs drained $1.75 billion from benefits that otherwise would have gone to taxpayers who qualified for the EITC. *See* Alan Berube, et al., The Brookings Inst., *The Price of Paying Taxes: How Tax Preparation and Refund Loan Fees Erode the Benefits of the EITC* 11 (2002), *available at* http://www.brookings.edu/dybdocroot/es/urban/publications/berubekimeitc.pdf.

Several states regulate tax preparers that make RALs, either through statutes that apply to them specifically or those that regulate loan brokers. *See, e.g.*, N.C. Gen. Stat. §§ 53-245 to 53-254; Letter from Thomas J. Curry, Mass. Comm'r of Banks, "Division of Banks Warns Tax Preparers" (Mar. 5, 2003), *available at* http://www.state.ma.us/dob/taxprep.htm (invoking Massachusetts statute requiring loan brokers to abide by 23% interest rate cap). Tax preparers are not subject to any national standards. *See* Nat'l Taxpayer Advocate, I.R.S., *FY 2002 Annual Report to Congress* 216 (2002), *available at* http://www.irs.gov/pub/irs-utl/nta_2002_annual_rpt.pdf.

Auto title pawns – Pawnbroking is one of the oldest sources of credit for financially marginalized people. Yet, the last several decades have seen both an increase in the number of pawn shops as well as variations on the traditional transaction, the leading one being the auto title pawn or title loan. Standard pawn transactions are structured as pledges or conditional sales of property in which the pawnbroker takes possession of the pledged or "sold" property and pays the customer. The customer has the right to redeem the property by paying a higher amount, usually a month later, but has no obligation to do so. Pawnbrokers generally are regulated by state pawnbroker

statutes, and in some states are exempt from usury limits. Auto title pawns emerged as an effort to take advantage of this favorable treatment, but the transaction differs from the traditional one in a substantial way, namely, the car owner pawns the title and keeps the car. In effect, therefore, these pawns constitute a small loan secured by a non-purchase money interest in the borrower's car. *See* Drysdale & Keest, *supra*, at 597. Lenders usually advance no more than one-third the book value of the vehicle and charge fees based on a percentage of the amount borrowed for a one-month term; APRs typically range from 200% to 300%. *Id.* at 599. If, as often happens, borrowers cannot pay the principal and interest on the due date, they can pay another fee to extend the loan; if they default, the lender can repossess the car.

Payday loans[3/] – As described more fully in the next section, payday lenders advance small amounts of money either by taking a post-dated check from which they withhold a fee and lend the balance or by having the borrower authorize an automatic debit from his or her bank account. The lender agrees to hold the check or not debit the account for a certain period, usually two weeks. When the loan term expires, the lender can deposit the check or debit the account, or the borrower can pay the lender the full face amount of the check in cash or money order. So, for example, a borrower writes a check for $115 and receives $100 in cash. At the end of the two-week period, the borrower pays the lender $115 to redeem the check, or authorizes the lender to deposit it. If the borrower cannot repay the loan when it becomes due, he or she can roll it over or extend the term by paying another fee without receiving additional cash. As discussed more fully below, triple digit APRs for a typical two-week loan far exceed state usury and small loan limits; fees paid to roll over loans send the APR even higher.

[3/] These loans also are referred to as "deferred deposit," "deferred presentment," "cash advance," "payroll advance," "check advance," and "post-dated check" loans.

B. The Evolution of Payday Loans Demonstrates Both Their Abusive Nature and Lenders' Ruses to Evade State-Imposed Interest Limits

1. Historical Background

As described above, payday loans are small, short-term, high-interest loans whose repayment generally is tied to the borrower's next pay day. These loans have direct precursors in loans made against a borrower's wages. As salaries increased to the point they covered necessities and provided a surplus to pay principal and interest on debts, "prospective salaries and wages became assets, however inchoate, against which loans could be made." Rolf Nugent, *The Loan-Shark Problem*, 8 Law & Contemp. Probs. 3, 4 (1941). The "five-for-six-boys" lent $5.00 at the beginning of the week, to be repaid with $6.00 on the borrower's next payday, one or two weeks later. *See* Drysdale & Keest, *supra*, at 618. In some instances, "salary buyers" would "buy" the borrower's next wage packet at a discount, for example, advancing $22.50 in exchange for the "sale" of a $25.00 paycheck two weeks later (with an APR of 311%). *Id.* at 618-19. Another practice involved having the borrower sign a bank check covering the loan principal and interest. The check was drawn on a bank in which the borrower did not have an account, and the lender said the check was "security" and would not be cashed but would be returned to the borrower when the loan was repaid. If the borrower defaulted, the lender deposited the check and threatened to prosecute the borrower when the bank refused payment. *See* Joe B. Birkhead, *Collection Tactics of Illegal Lenders*, 8 Law & Contemp. Probs. 78, 86 (1941).

These types of loans were short-term, with two weeks being the most common period. William H. Simpson, *Cost of Loans to Borrowers Under Unregulated Lending*, 8 Law & Contemp. Probs. 73, 73 (1941). While the interest rates on these loans were usurious, borrowers generally did not know their rights or have access to the courts, resulting in few challenges. "The one who suffers most at the hands of high-rate lenders is the borrower, yet he is almost the only member of society who has done nothing about his plight." Drysdale & Keest, *supra*, at 619-20 (citing George L. Gisler, *Organization of Public Opinion*

for Effective Measures Against Loan Sharks, 8 Law & Contemp. Probs. 182, 182 (1941)).

Despite the high cost, people in financial distress renewed these small loans, entering a downward spiral mirrored by today's payday borrowers. *See* Drysdale & Keest, *supra*, at 620. The dire situation in which these borrowers found themselves led to legislative efforts to regulate the lenders. What emerged was a legal framework that permitted a high enough return to attract legitimate businesses into the small loan market, with sufficient safeguards to prevent the abuses that prevailed among "loan sharks." *Id.* at 621 (citing Frank B. Hubachek, *Annotations on Small Loans: Based on the Sixth Draft of the Uniform Small Loan Law* 1-3 (1938)). While lenders argued that these transactions involved property purchases and thus were not governed by usury laws, the Uniform Small Loan Laws adopted by many states between 1916 and 1935 defined them as cash lending, subjecting them to small loan regulation. *See* John P. Caskey, *Fringe Banking: Check Cashing Outlets, Pawn Shops, and the Poor* 31-32 (1994) [hereinafter Caskey]. Every state except Arkansas enacted small loan laws, with Arkansas capping interest in its constitution. Drysdale & Keest, *supra*, at 621.

2. Contemporary Payday Lending

In its current form, payday loans involve the borrower writing a personal check payable to the lender and receiving cash minus a fee. The lender and borrower both know the borrower does not have sufficient funds in his or her account to cover the check, and the lender agrees to hold the check until the borrower's next payday or another designated date. At the end of the initial loan term, usually one or two weeks, the customer can redeem the check by paying the face amount, allow the check to be cashed, or refinance ("roll over") the loan by paying another fee. Payday loans are marketed as a quick, easy way to obtain cash. To qualify, borrowers need only maintain a personal checking account, be employed for a specified period with their current employer, and show a pay stub and bank statement. Lenders do not routinely conduct credit checks or make other inquiries into the borrowers' ability to repay. Annualized interest rates

average around 500%. *See generally* Nat'l Consumer Law Center, *The Cost of Credit: Regulation and Legal Challenges* (2d ed. 2000 & Supp. 2002) at §§ 7.5.5 & n.357, 7.5.5.3. While lenders have argued that the absolute dollar amounts are small, not only are these loans still expensive given their short term, but frequent rollovers and the use of multiple high-cost credit sources by payday loan customers collectively drain significant amounts of money from the budgets of economically fragile families.

There has been an explosive growth in payday lending in the United States since the industry emerged in the early 1990s. *See* Scott A. Schaaf, *From Checks to Cash: The Regulation of the Payday Lending Industry*, 5 N.C. Banking Inst. 339, 339 (2001) [hereinafter Schaaf]. It is estimated that more than 10,000 payday loan outlets are operating, and Stephens, Inc., a Little Rock, Arkansas investment firm, predicted that by 2002 there would be 25,000 stores that would generate $6.75 billion annually in *fees alone*. *See* U.S. Pub. Interest Research Group & Consumer Fed'n of Am., *Show Me the Money! A Survey of Payday Lenders and Review of Payday Lender Lobbying in State Legislatures* 8 (2000), *available at* http://www.pirg.org/reports/consumer/payday/showmethemoneyfinal.pdf [hereinafter *Show Me the Money!*]. Stephens, Inc. also forecasted that "the annual volume of business will total 180 million transactions with $45 billion volume of loans to produce that $6.75 billion in fee volume." *Id.* (citing Stephens, Inc., *The Developing "Payday Advance" Business: The Next Innings: From Emergence to Development* 9 (1999)).

This growth has been tied to the deregulation of the banking industry, the lack of traditional lenders in the small loan, short-term credit market, and the elimination of interest rate caps. *See* Lisa B. Moss, *Modern Day Loan Sharking: Deferred Presentment Transactions & The Need For Regulation*, 51 Ala. L. Rev. 1725, 1732 (2000) (citing Nat'l Consumer Law Center, *Special Issue: Check Cashers, Pay Day Loans and Pawns*, 16 NCLC Reports, Consumer Credit & Usury Ed. 13-14 (1998)) [hereinafter Moss, *Modern Day Loan Sharking*]. Deregulation in the 1980s led banks to eliminate less profitable services, such as free checking and small balance accounts, leaving millions of

low-income households with little access to free financial services. *Id.* As mainstream institutions moved out of the small loan market due to higher returns on larger loans, payday lenders filled the void. *Id. See also* Schaaf, *supra*, at 340-41. In addition to an increased number of stand alone payday lenders, the recent surge in the number of payday loans also can be attributed to the entry into the market by check cashing outlets, convenience stores, gas stations, and pawn shops, as well as offers on the Internet. *Show Me the Money!*, *supra*, at 8.

3. Lenders' Relationships With National Banks Are Just the Latest in a History of Attempts to Evade Interest Caps

Payday lenders have devised a number of contrivances in order to assert that usury laws do not apply because they are not making loans. Initially, many lenders argued that they did not make loans or charge interest at all, but simply charged "fees" for the financial service of cashing checks. Under this "delayed presentment" check cashing arrangement, payday lenders claimed that since they were not lending money, they were not subject to federal and state laws that regulate extensions of credit, require licensing and certain disclosures, and limit the interest that lenders can charge to levels substantially below the triple digit rates most of them charged. Courts uniformly have rejected the pretense that payday lenders were not making loans when they delayed depositing a consumer's checks in exchange for a fee. *See, e.g.*, *Turner v. E-Z Check Cashing of Cookeville, TN, Inc.*; 35 F. Supp. 2d 1042 (M.D. Tenn. 1999); *Hamilton v. York*, 987 F. Supp. 953 (E.D. Ky. 1997); *In re Miller v. HLT Check Exchange*, 215 B.R. 970, 1997 Bankr. LEXIS 2107 (E.D. Ky. 1997); *Livingston v. Fast Cash USA, Inc.*, 753 N.E.2d 572 (Ind. 2001); *White v. Check Holders, Inc.*, 996 S.W.2d 496 (Ky. 1999); *Quick Cash, Inc. v. State Dep't of Agric. & Cons. Servs.*, 605 So. 2d 898 (Fla. Dist. Ct. App. 1992).

The United States Federal Reserve Board similarly rejected payday lenders' assertions that the delayed presentment transactions involved only "fees" rather than "interest" on loans, and mandated that payday lending include interest rate and other

disclosures required by the Truth in Lending Act. *See* Comptroller of the Currency, *Regulation Z Truth in Lending: Final Rule Revision to Official Staff Commentary*, 2000 OCC CB LEXIS 22 (2000); 65 Fed. Reg. 17,129 (Mar. 31, 2000).

As courts and regulators rejected the pretense that these transactions were not loans involving interest charges, the industry developed new schemes. For example, in the modern equivalent of a scam used in the 1930's and 1940's by lenders trying to charge usurious interest rates, *see Willis v. Buchman*, 199 So. 886 (Ala. Ct. App.), *rev'd for mootness*, 199 So. 892 (Ala. 1940), some payday lenders labeled their loans as "catalog sales," "gift certificates," or "retail sales" of merchandise. In a typical scenario, the borrower gave the lender a post-dated check for $130. The lender agreed to hold the check for two weeks and gave the borrower $100 in cash and $30 worth of gift certificates or merchandise coupons. The amount of the coupons or certificates equaled the difference between the cash received by the borrower and the face amount of the check. If the borrower wanted to redeem the coupons or certificates, she or he had to return to the lender to place the order, at which time the lender charged the consumer additional fees, such as shipping and handling, a mark up, and sales tax. Not only would the lender not have received any of the add-ons if the consumer made the same purchase directly from the catalog wholesaler, but the added charges often made the merchandise unaffordable so that the consumer never redeemed the coupons or certificates. The lender thus kept their full value as profit. *See* Moss, *Modern Day Loan Sharking*, *supra*, at 1729-30. On the two-week $100.00 loan, the $30 certificate translated to an APR of 780%. *See, e.g., Cashback Catalog Sales, Inc. v. Price*, 102 F. Supp. 2d 1375, 1379 (S.D. Ga. 2000).

Another scheme, the "cashback ad," involves the pretense that the interest paid actually is purchasing an ad in a publication distributed by the lender. *See* Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 Minn. L. Rev. 1, 20 (2002) (citing Ruth Cardella, Consumers Union, *Wolf in Sheep's Clothing: Payday Loans Disguise Illegal Lending* 3 (1999), *available at* http://www.consumer.org/pdf/paydayloans.pdf. For example, a consumer who wants to borrow $100 has to pay an

advertisement fee of $33. The lenders maintain that they are charging a fee for the sale of a service and insist that the consumer pay for an ad in order to receive cash. The lender holds the consumer's check as a "security deposit" and "rebates" it when the consumer repays the loan two weeks later. If the consumer cannot repay the loan when it is due, he or she must renew the loan by paying an additional fee to purchase another ad. In one case, after six ad purchases, the lender guaranteed no further purchases would be necessary. The APR on these "ad" loans was 860%. *See* Drysdale & Keest, *supra*, at 604 (discussing Memorandum in Support of Plaintiffs' Motion for Class Certification in *Rodriguez v. Cash Today, Inc.*, No. C-99-305, *cert. granted*, 199 F.R.D. 566 (S.D. Tex. 2000); *see also Texas v. Cash Today, Inc.*, No. 99-02673 (Tex. Dist. Ct. Dec. 17, 1999).

In response to the wholesale rejection by courts and regulators of these ruses, payday lenders, tax preparers, and others, devised the "rent-a-bank" scheme through which to market their high-interest loans. By associating with a national bank, and claiming the bank is the lender, the check cashing outlet, tax preparer, etc., seeks to take advantage of the national bank's ability to export its home state's interest rate and thus to evade the usury and other interest rate caps imposed in the states where they do business. *See Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978). State regulators and borrowers have brought lawsuits seeking to pierce this ruse by proving that the check cashing outlet or other payday vendor is the true lender, notwithstanding its representations to borrowers that the national bank is the lender and the appearance of the bank's name on loan documents. *See, e.g., Purdie v. ACE Cash Express & Goleta Nat'l Bank*, CA No. 301-CV1754-X (N.D. Tex. filed Sept. 6, 2001); *Brown v. ACE Cash Express*, CA No. 24-C-01-004036 (Md. Cir. Ct. filed Aug. 20, 2001); *State ex rel. Ken Salazar, Att'y Gen. v. ACE Cash Express, Inc.*, Case No. 01CV3739 (Colo. Dist. Ct. filed July 13, 2001); *State ex rel. Roy Cooper, Att'y Gen. v. ACE Cash Express, Inc.*, No. 02-CVS-330 (N.C. Super. Ct. filed Jan. 14, 2002); *Long v. ACE Cash Express*, No. 00837-CA (Fla. Cir. Ct. filed Nov. 1, 2000). The lawsuits allege that the payday vendor possesses all the indicia of being the lender, namely, that it takes loan applications,

selects the credit scoring criteria, determines borrower eligibility, disburses loan proceeds, collects principal and interest from the borrower, and assumes the risk of non-payment. This form of lending has been dubbed "rent-a-bank" or "rent-a-charter" lending because the bank's only real participation is to lend its name and national charter to the transaction for a one or two-day period.

C. State Laws Protect Consumers From The Exploitative Practices of the AFS

Americans benefit from strong consumer protections in the marketplace that enhance their economic security. The growth of the fringe banking industry, specifically targeting consumers most vulnerable to predatory financial practices and least able to protect themselves from abuse, warrants stronger regulation and the rejection of exploitative lenders' attempts to evade these protections.

A large percentage of consumers who use fringe banks have no reasonable alternatives. They may need money immediately to pay rent or repair a car to get to work. Caskey, *supra*, at 78. Lack of education often is another factor in many consumers' decisions to use fringe banks, as consumers with lower education levels are likely to have limited knowledge of credit transactions. The National Institute for Literacy, an interagency group comprised of the U.S. Departments of Education, Labor, and Health and Human Services, found a total of 21% to 23% – or 40 to 44 million – of the 191 million American adults aged 16 or older perform at the lowest math and reading literacy level. Stephen Reder, Nat'l Inst. for Literacy, *The State of Literacy in America: Synthetic Estimates of Adult Literacy Proficiency at the Local, State and National Levels* (1998), *available at* http://www.nifl.gov/reders/!intro.htm.

AFS consumers frequently are at a distinct disadvantage because of limited education, bargaining power, and financial desperation. Many of them also mistakenly believe that despite good credit histories, that their low-income alone will disqualify them for more reasonably priced credit. For these reasons, vulnerable consumers need special protection. This is the basis

for usury laws and other more recent state statutes regulating the fringe banking industry. Usury laws have, for hundreds of years, been enforced to "protect the needy from the greedy." Drysdale & Keest, *supra*, at 657. For example, more than a century ago, a court stated:

> "These statutes were made to protect needy and necessitous persons from the oppression of usurers and monied men, who are eager to take advantage of the distress of others; while they, on the other hand, from the pressure of their distress, are ready to come to any terms; and with their eyes open, not only break the law, but complete their ruin."

Whitworth & Yancy v. Adams, 26 Va. (5 Rand.) 333, 335 (1827) (quoting *Brown v. Morris*, Cowp. Rep. 792). *See also Schneider v. Phelps*, 359 N.E.2d 1361, 1365 (N.Y. 1977) ("The purpose of usury laws, from time immemorial, has been to protect desperately poor people from the consequences of their own desperation. Law-making authorities in almost all civilizations have recognized that the crush of financial burdens causes people to agree to almost any conditions of the lender and to consent to even the most improvident loans. Lenders, with the money, have all the leverage; borrowers, in dire need of money, have none."); *Scarr v. Boyer*, 818 P.2d 381, 383 (Mont. 1991) ("usury statutes protect borrowers who lack real bargaining power against overreaching by creditors.").

Consumer protection laws reflect the fact that the consumer credit marketplace lacks equal bargaining power, equal knowledge, and a level playing field with respect to negotiating leverage. *See, e.g., In re Jordan*, 91 B.R. 673, 688 (Bankr. E.D. Pa. 1988) ("It is not surprising that interested, sophisticated lenders consistently interpret ambiguous laws to their own advantage and to the disadvantage of their obviously less-sophisticated customers. This data only highlights [sic] the need of the disinterested courts to be vigilant to prevent industry-wide overreaching."). These inequalities are more pronounced in the AFS than in the mainstream consumer credit marketplace, and consumers who resort to these products are among those with the greatest need for a marketplace that operates with integrity and

the enforcement of laws state legislatures intended for their protection. Lenders in the AFS should not be able to evade the usury, small loan, and other interest rate limits that states have designed to protect necessitous consumers from these lenders' exploitative practices.

Moreover, a ruling by the Court that the National Bank Act completely preempts state usury claims also will effectively remove regulation of non-bank small loan lenders from the states, where it traditionally has existed. These lenders will be able to escape accountability in the courts of their own states simply through the ruse of a "rent-a-bank" arrangement. Complete preemption will prevent states from seeking relief from courts in their own states, applying solely their own state laws, to regulate tax preparers that broker RALs and payday lenders and others that rent national bank charters.

CONCLUSION

Amici curiae respectfully urge the Court to affirm the Eleventh Circuit and allow vulnerable consumers the protection of state usury and other laws enacted for their benefit.

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Respectfully submitted,

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